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**Northumbria  
University**  
NEWCASTLE

**NORTHUMBRIA UNIVERSITY**

**EXPERIENCES OF SEXUAL  
ORIENTATIONS AND GENDER  
IDENTITIES DURING  
IMPRISONMENT: A QUEER CRITIQUE  
ON THE ENFORCEMENT OF HUMAN  
RIGHTS NORMS IN ENGLAND AND  
WALES, AND ITALY**

**GIUSEPPE ZAGO**

**PhD**

**2020**



**NORTHUMBRIA UNIVERSITY**

**EXPERIENCES OF SEXUAL ORIENTATIONS AND  
GENDER IDENTITIES DURING IMPRISONMENT: A  
QUEER CRITIQUE ON THE ENFORCEMENT OF  
HUMAN RIGHTS NORMS IN ENGLAND AND  
WALES, AND ITALY**

**GIUSEPPE ZAGO**

A thesis submitted in partial fulfilment of  
the requirements of the University of  
Northumbria at Newcastle for the degree of  
Doctor of Philosophy

April 2020

## **Abstract**

This thesis analyses how sexual minorities, transgender and gender non-conforming people negotiate their sexual and gender identities and behaviours within the prison system, looking at the treatment of prisoners in two European jurisdictions, England and Wales, and Italy. Although lesbian, gay, bi, transgender and queer (LGBTQ) prisoners represent a minority among the prison population, their very existence challenges a legal and normative model based on heteronormative, hypermasculine and gender binary foundations.

The research intends to problematise the current legal characterisation of imprisonment as a site of promotion of coherent sexualities and identities by adopting a queer socio-legal approach, in order to examine how State power constructs deviant subjects and makes them invisible. Furthermore, it speculates on how these normative paradigms can be challenged through a process of queering. Particularly, it questions whether international human rights norms as internalised in domestic laws and policies regulating imprisonment can contribute to queer the prison complex, or on the contrary reinforce the perpetuation of exclusionary practices.

By using a qualitative methodology, participants who self-identified as LGBTQ were selected among prisoners located in two penal institutions in England and Wales and three establishments in Italy. The study undertook a comparative analysis to understand commonalities and dichotomies in the interconnection between essentialist, heteronormative policies and the legal construction of the homosexual and transgender prison subject under the umbrella of the international human rights discourse.

Conducting interviews inside multiple prisons revealed that LGBTQ prisoners constantly struggle to manifest their sexuality and identity. It showed that the invisibility of the deviant subject is fuelled by discriminatory and unequal organisational strategies only partially tackled by a human rights discourse also in need of queering.

However, participants in the study were able to originate a few moments where their instances were recognised thanks to various mechanisms of resistance that remain largely ignored by the law. This research provides examples of how such practices vary depending on each prison environment, discussing their impact on prison life.

## Glossary of Terms and Abbreviations

<i>Term or Abbreviation</i>	<b>Explanation</b>
<i>AFAB</i>	Assigned Female at Birth
<i>AMAB</i>	Assigned Male at Birth
<i>Cisgender</i>	A person whose gender identity or sex aligns with the gender or sex they were assigned at birth. A person who is not transgender.
<i>CJS</i>	Criminal Justice System
<i>CoE</i>	Council of Europe
<i>CoM</i>	Committee of Ministers of the Council of Europe
<i>Cross-dresser</i>	A term typically used to refer to men who occasionally wear clothes, makeup, and accessories culturally associated with women. A form of gender expression, it is not done for entertainment purposes.
<i>ECHR</i>	European Convention of Human Rights
<i>ECtHR</i>	European Court of Human Rights
<i>EPR</i>	European Prison Rules
<i>EU</i>	European Union
<i>FTM</i>	Female to Male. It refers to someone who was designated female at birth but identifies and expresses himself as a man. Many FTM transgender people prefer the term "trans(gender) man" to describe themselves.
<i>Gender fluid</i>	An unfixed, fluid gender identity.
<i>Gender Non-Conforming</i>	A term used to describe some people whose gender expression is different from conventional expectations of masculinity and femininity. Not all gender non-conforming people identify as transgender; nor are all transgender people gender non-conforming. Simply being transgender does not make someone gender non-conforming.
<i>GRA</i>	Gender Recognition Act
<i>GRC</i>	Gender Recognition Certificate
<i>HMPPS</i>	Her Majesty's Prison and Probation Service
<i>HRCComm</i>	UN Human Rights Committee

<i>ICCPR</i>	International Covenant on Civil and Political Rights
<i>ICESCR</i>	International Covenant on Economic, Social and Cultural Rights
<i>LGBT</i>	Lesbian, gay, bisexual, transgender
<i>LGBTI</i>	Lesbian, gay, bisexual, transgender and intersexual
<i>LGBTQ</i>	Lesbian, gay, bisexual, transgender and queer
<i>MTF</i>	Male to Female. It refers to someone who was designated male at birth but who identifies and expresses herself as a woman. Many MTF transgender people prefer the term "trans(gender) woman" to describe themselves.
<i>NOMS</i>	National Offenders Management Service
<i>Non-binary or Gender Queer</i>	A spectrum of gender identities that are outside the gender binary categories of masculine – feminine. People who do not exclusively identify with the categories of man and woman.
<i>PACE</i>	Parliamentary Assembly of the Council of Europe
<i>SRT</i>	Special Rapporteur on Torture
<i>Straight</i>	A heterosexual person, or person who is sexually attracted to the opposite sex.
<i>Transgender</i>	A non-cisgender person. An umbrella term for people whose gender identity or expression does not align with the gender they were assigned at birth. People under the transgender umbrella may describe themselves using one or more of a wide variety of terms – including transgender.
<i>Transition</i>	The process to alter one's birth sex, which can include all or some different personal, medical, and legal steps over a long period of time: telling one's family, friends, and co-workers; using a different name and new pronouns; dressing differently; changing one's name and/or sex on legal documents; hormone therapy; and possibly (though not always) one or more types of surgery. The exact steps involved in transition vary from person to person.
<i>Transsexual</i>	Transsexual is an older term used to identify people whose gender identity does not align with the gender they were assigned at birth, and that generally seek to change – or have



permanently changed – their bodies through medical interventions, including but not limited to hormones and/or surgeries. Many transgender people and activists prefer the term transgender to transsexual, which is loaded with medical and biological connotations, but some people – including many of the participants in this study – still prefer to use the word transsexual.

*Trans* Used as shorthand to mean transgender or transsexual – or sometimes to be inclusive of a wide variety of identities under the transgender umbrella.

*UDHR* Universal Declaration of Human Rights

*UNCAT* United Nations Convention Against Torture

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## **Declaration**

I declare that the work contained in this thesis has not been submitted for any other award and that it is all my own work. I also confirm that this work fully acknowledges opinions, ideas and contributions from the work of others. Any ethical clearance for the research presented in this thesis has been approved. Approval has been sought and granted by the Faculty Ethics Committee / University Ethics Committee at the University of Northumbria at Newcastle.

**I declare that the Word Count of this Thesis is: 84,687**

**Name: Giuseppe Zago**

**Signature:**



**Date: 7 April 2020**

*Ma questo é proibito qui nel regno dell'estrema chiarezza apparente,  
dove tutto invece rimane occulto e insondabile*

*(But this is forbidden here, in the realm of apparent extreme clarity,  
Where everything remains instead secret and unfathomable)*

Goliarda Sapienza, *L'Università di Rebibbia*



# Chapter 1

## Introduction

In 2015, Joanne Latham and Vikki Thompson, two transgender women, died while on remand in women's prisons. Ms Thompson was found hanged in her cell at HMP Leeds. The same happened to Ms Latham at HMP Woodhill, in the same year.

Ms Thompson was located in a male prison, as she did not possess a Gender Recognition Certificate acknowledging her legal female gender. She filed complaints of bullying while imprisoned. Having had a history of self-harm and substance abuse, prison staff placed her in a special wing dedicated to the most vulnerable inmates, and on suicide watch. However, her risk levels were downgraded at the time of her death.<sup>1</sup>

Ms Latham was in the early stages of changing her gender when she was sentenced to imprisonment, according to the BBC.<sup>2</sup>

In Italy, news has reported the suicide of a transgender woman at the male prison of Udine, while in another penal estate a special wing for homosexual prisoners has been closed after the Ombudsman on the rights of persons deprived of their liberty found the arrangement in violation of human rights, due to the complete isolation suffered by the prisoners hosted there.

In a prison in Padova, two men in a same-sex relationship declared they wanted to get married and were allowed by the prison management to share the same cell, unleashing the wrath of the prison police union: "This is not the way to deal with the problem of intimacy in prison."<sup>3</sup>

At Rebibbia female penal estate, women inmates organised a play where they re-interpreted "Romeo and Juliet" as a love story between two women. "It is the first time that I do theatre and I am able to express all my pain, all my inner anger" Alessandra, one of the actresses, told the press.<sup>4</sup>

---

<sup>1</sup> The Guardian, 'Transgender woman at male prison did not mean to kill herself, jury finds', by Helen Pidd, 19 May 2017, at [<https://www.theguardian.com/uk-news/2017/may/19/jury-returns-verdict-on-transgender-woman-found-dead-in-male-prison>], accessed 25 September 2019.

<sup>2</sup> BBC News, 'Transgender inmate found dead in Woodhill prison cell', by Sally Chidzoy, 1 December 2015, at [<https://www.bbc.co.uk/news/uk-england-beds-bucks-herts-34972221>], accessed 25 September 2019.

<sup>3</sup> Fanpage.it, 'Padova, coppia gay in carcere nella stessa cella: "Vogliamo sposarci". Sindacato polizia insorge', by Biagio Chiariello, 6 June 2019, [<https://www.fanpage.it/attualita/padova-coppia-gay-in-carcere-nella-stessa-cella-vogliamo-sposarci-sindacato-polizia-insorge/>], accessed 25 September 2019.

<sup>4</sup> Il Fatto Quotidiano, 'Carcere, le detenute di Rebibbia portano in scena l'amore omosessuale: "Con il teatro esprimiamo il nostro dolore"', by Angela Nittioli, 15 June 2019.

These are just a few examples depicting the situation of LGBTQ prisoners in England and Wales (England), and in Italy, but I believe they represent well the consequences – some documented by the literature and jurisprudence on the topic, some more unexpected – that may arise from the interaction between sexual minorities, transgender and gender non-conforming individuals and the criminal justice system (CJS).

Michel Foucault illustrated in his essay *Discipline and Punish: The Birth of the Prison* the ways State power exercises tight surveillance on prisoners' lives, and how punishment through confinement has always been connected to the necessity of controlling the body, including people's sexuality, by caging individuals deviating from the norm.<sup>5</sup>

The structure and organisation of penal institutions have changed in many ways since the publication of Foucault's work, and yet the State continues imposing the regulation of sexuality through a coherent discourse. Erasure of sexual and gender diversity outside, but especially inside prison, still constitutes the normative paradigm at the core of contemporary prison policies.

The LGBTQ prison population represents a minority as compared to the general number of convicted individuals.<sup>6</sup> Nevertheless, they challenge the prison model with their very existence, and for this reason, they suffer serious consequences which have remained largely unexplored by the literature on prison.

A gender binary system based on the separation of subjects according to their sex at birth is inherently incapable of contemplating – and accommodating – people who identify as non-binary, gender non-conforming, transsexual or transgender. Similarly, the carceral state prohibits sex, without accepting that single-sex environments can nurture, or give rise, to same-sex relationships, nor that sexuality is an essential component of private personality. As a personal characteristic of great importance in defining the person, and in continuous evolution, it should ultimately be protected when its manifestations are based on mutual consent.

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[<https://www.ilfattoquotidiano.it/2019/06/15/carcere-le-detenuite-di-rebibbia-portano-in-scena-lamore-omosessuale-con-il-teatro-esprimiamo-il-nostro-dolore/5233450/>], accessed 25 September 2019.

<sup>5</sup> Michel Foucault, *Discipline and Punish. The Birth of the Prison* (Penguin Books, II ed. 1991).

<sup>6</sup> According to data made available by the UK Ministry of Justice, as at March 2018, 2.7% of the prison population identified as Gay/Lesbian/Bisexual or Other. Gay/Lesbian and Bisexual accounted for 1.3% each, while 0.1% identified as Other. The declaration rate for sexual orientation was 88%, based on an average of the prison population taken between January and March 2018. It excludes those who refused or did not disclose their sexuality, or where sexual orientation was not known. In the 2018 data collection, there were 139 transgender prisoners: 111 reported their legal gender as male, 23 as female and five did not state their legal gender. Statistics exclude transgender prisoners who have already transitioned and have a full Gender Recognition Certificate. Both data on sexual orientation and gender identity likely underrepresent the total number of LGBTQ prisoners hosted in English prisons. See HM Prison and Probation Service, *Offender Equalities Annual Report: 2017 to 2018* (Official Statistics Bulletin, 29 November 2018), at [<https://www.gov.uk/government/statistics/hm-prison-and-probation-service-offender-equalities-annual-report-2017-to-2018>], accessed 27 December 2019.

I aimed to problematise the current legal characterisation of the prison system as a site of promotion of coherent sexualities supported by a heteronormative paradigm, favouring a sex hierarchy that places the heterosexual male white subject at the top and fueling specific forms of homophobic and transphobic discrimination.<sup>7</sup> In order to accomplish this, I believed that a “law in context” approach was most appropriate to determine the influence of the institutional power on manifestations of sexuality and gender identities during imprisonment. Accordingly, the analysis of the law in two European jurisdictions, England and Italy, interfaced with an empirical study conducted through the qualitative analysis of 21 semi-structured interviews with prisoners who self-identified with non-heterosexual or non-cisgender identities and, at the time of the data collection, were hosted in prisons located in both countries.

A queer socio-legal methodology was necessary to understand the practical effects of laws and policies in relation to a field where there is a relative scarcity of studies on sexual activity, intimacy, and queer lives during imprisonment.

I will describe more in detail the implications of undertaking such an approach in Chapter 3, where I will explain the research methodology.

The examination of the prison system in these jurisdictions from a legal perspective, and with a focus on sexual and gender diversity, had two main consequences. Queer theory, particularly the work of Judith Butler on gender performativity, Gayle Rubin on sex negativity, and Sara Ahmed on queer phenomenology, constituted the backbone of the legal analysis, together with the reflections of queer legal theorists such as Carl Stychin and Francisco Valdes. One of the scopes of this research consisted of enriching criminological research and prison law studies with a queer perspective challenging unquestioned assumptions.

Secondly, the research zoomed in on the impact of the human rights discourse on the prison normative system of these two jurisdictions. The work of international organs at the UN, but especially at the Council of Europe level, has had a remarkable effect in shaping the prison legal framework, yet I intended to interrogate the shortcomings of the process of internalisation of international standards in light of the continuous suffering of the LGBTQ prison population as documented in the literature and reverberating in my participants’ accounts. Is the human rights system contributing to the construction of the heteronormative gender binary subject?

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<sup>7</sup> David Cohen, ‘Keeping Men “Men” and Women Down: Sex Segregation, Anti-Essentialism and Masculinity’ (2010), 33 *Harvard Journal of Law & Gender*, 509 – 553.

## 1.1 Research questions

The aim of this research was primarily to analyse the experiences of prisoners of different sexual orientations and gender identities during lawful imprisonment in England and in Italy, in order to examine how they negotiate their identities, sexualities and gender expressions within the context of prison.

At present, little empirical research exists on non-conforming genders and sexualities inside prison, especially in relation to European human rights law. I sought to adopt a comparative socio-legal analysis targeting European jurisdictions to verify whether human rights standards are effectively internalised in States of different legal and social traditions.

I based my research on a qualitative analysis conducted through the completion of 21 semi-structured interviews. The empirical research work is largely grounded on feminist methodologies, while queer methodologies have primarily informed the data analysis.

I initially wanted to find out how participants define their identity and sexuality, and how they related to each other's, and with other prisoners and staff. Particularly, I was interested in exploring the effects of the organisational policies of prison on LGBTQ people, and whether they fuelled forms of homophobia, transphobia and discrimination. Prison sexuality studies have tended to focus on bodily acts between prisoners in isolation, while I decided to discuss these acts within a broader pattern of discrimination and abuse.

After concluding my fieldwork, I reviewed my original theoretical and methodological framework in light of my findings. Participants' narratives allowed consideration of the different ways discrimination can manifest between male and female prisons. I decided to flesh out the relational dynamics taking place between women prisoners as compared to men. On the other hand, I found that prison is a site where positive (intimate) relationships can arise, although the State apparatus tends to overlook this possibility.

The situation of transgender inmates required a specific assessment to draw similarities and peculiarities as compared to the other groups I interviewed, while the intersections between sex, sexuality and gender became a crucial point of my epistemological framework.

In general, despite the diverse range of approaches to sexual orientation and gender identity I encountered in each prison, a common element emerging both from participants' accounts and informal chats with prison staff concerns the tension between the introduction of measures aimed at ensuring protection of sexual and gender minorities – at least formally – and the negative consequences these



decisions often have on LGBTQ prisoners. Particularly, they can translate into isolation and forms of unnecessary surveillance, and sanctioning of expressions of intimacy.

In order to address my interest on the impact the prison normative framework has on LGBTQ prisoners, I developed three research questions:

1. How do prisoners negotiate their sexual orientations and gender identities before the normative power of the State prison complex?
2. What is the role of the law in shaping and controlling sexualities and identities within the prison complex?
3. Are human rights norms – internalised in domestic laws and policies regulating imprisonment – “queering” the prison complex, or do they contribute to perpetuating coherent sexualities and identities?

These questions were elaborated to inform my inquiry on the experiences of sexual and gender minorities during lawful imprisonment. They helped me in guiding the interview and structuring the dialogue with my participants. Elaborating on these, I argue that legal shortcomings in constructing a narrative on sexuality and identity that distances itself from heteronormative, essentialist paradigms, contribute to consolidating prison as a site of toxic masculinity, homophobia and transphobia (or more comprehensively, queerphobia). Although moments of “queerness” in the organisation of prison, if supported by interpretations of human rights standards that embrace inclusivity and diversity, can introduce forms of acceptance and recognition, they remain however insufficient without challenging the normative foundations of prison at their core.

## 1.2 Thesis structure

In Chapter 2, I review the existing literature on sexuality, gender identity and prison conditions. Studies on the LGBTQ prison population are largely American-based. They tend to focus on the question of prison sex, and to a lesser extent, prison social visits. More recently, the debate regarding the location of transgender prisoners has drawn the attention of academic scholars and professionals in both England and Italy.

However, I argue that there is a lack of dialogue between criminology, gender and sexuality, and human rights research. I thus make an overview of the notion of queer and its different meanings to highlight how queer as an identity, and queer as a method, can contribute to build bridges among these disciplines, to help the plural identities populating the prison environment to emerge in their uniqueness, were they transgender, homosexual, lesbian, bisexual or questioning their identity or behaviour.

I use Judith Butler's notion of performativity, Gayle Rubin's theorisation of sex negativity and sex hierarchy, along with Foucauldian and post Foucauldian reflections on the relationship between sexuality, identity and power, to outline the problematic construction of the sexual and gender diverse subject in international and domestic prison law. From this perspective, I critically engage with the work of human rights scholars concerning the development of a right to sexual orientation and gender identity (e.g. Waaldijk's elaboration of a right to relate), and on the queer critique of the human rights discourse proposed by Valdes, Gonzales-Salzberg and Dianne Otto, among others.

The analysis of a queer approach, and its debt to constructionist and post-structuralist feminist theory, ultimately helps in fleshing out the gaps in the way the legal discourse addresses discrimination of sexual and gender minorities within prison. I propose a queering of the current legal framework to assess whether the carceral state can finally favour the internalisation of human rights norms acknowledging plural expressions of gender and sexuality against managerial policies of surveillance.

In Chapter 3, I detail the epistemological and methodological framework of my research. I explain why a queer socio-legal approach that goes beyond the analysis of doctrinal and jurisprudential sources is necessary to verify whether internalised human rights norms capture the wide range of sexualities and identities emerging from participants' accounts. I go on to outline the importance for my study of undertaking a qualitative method, as I deem it crucial to explore the emotional implications of the prison experience on persons self-identifying as lesbian, gay, bisexual, transgender or other non-heterosexual, non-cisgender identities and orientations. To this scope, I consider a queer method the most appropriate to analyse data on sexual identity and gender expressions, taking into account Warner and Jagose's work on the multiple meanings attached to the term queer. I ultimately use queer as an umbrella term to capture plural identities, and as an action to guide the deconstruction of legal categories, which present a tendency to conflate sex, sexual orientation and gender, producing critical effects for LGBTQ prisoners. In Chapter 3, I dedicate a section to illustrate the methodological design I used to gain access to different prison institutions, and reflect on the ethical implications of my personal choices, as well as on the limits imposed by the negotiation with representatives of State power. The National Prison Services of both countries, and Prison Managers running each prison I visited, shaped my choices regarding the participant sample and the practical arrangements to complete my interviews. Yvonne Jewkes' theory on criminological researchers "getting in, getting on, getting out" of prison was very useful to frame my approach to fieldwork. It highlights the bureaucratic nature of the prison research process and the emotional consequences for my participants, and for me as a researcher, that I had to anticipate in order to ensure our well-being during and after the interviews, as well as the constant effort to balance confidentiality, consent, transparency and prison regulations in conducting the interviews. I referred to Seale's distinction between interview data as source and interview data as topic to specify that I focused on a feminist, post-modernist approach to interviewing; I take into account the interactive

character of the interviewing process as a constructive site for the relationship between the interviewer and the participants in the data analysis.

Finally, Chapter 3 addresses the adoption of a comparative methodology, where I underline that a comparison must be drawn not only between legal systems, but also between different personal experiences. Adopting Legrand's conception of difference, according to whom the transplant of legal concepts is never fully possible due to the diversity in social concepts, I intend to highlight with this research the vertical comparison between England and Italy, and the different process of internalisation of human rights norms they operate, which leads to a different framing of sexualities and identities, and to produce diverse experiences.

Chapter 4 delves into the development at the international and European regional level of the "homosexual" and "transgender" subject on the basis of the right to privacy and non-discrimination, and to what extent international recommendations can influence the recognition and protection of LGBTQ prisoners nationally. It underlines how the United Nations (UN) and the Council of Europe (CoE) organs have contributed to make it explicit that sexual orientation and gender identity constitute grounds of non-discrimination under the main international Conventions and Treaties, yet the international legal homosexual and transgender individual has been developed through a process of "othering" similar to what happened with the definition of woman as derivative to man. Human rights law has usually been considered as the gateway to advance gender and sexuality-related rights, giving legitimacy to advocates' claim to equality; however, feminist and queer legal theory, as exemplified in the work of Johnson, Otto and Gonzales-Salzberg among others, advances a critique to this scheme. Although recently adopted legal instruments pay more attention to intersectionality in qualifying the struggle of LGBTQ people, the international law framework presents heteronormative and essentialist foundations. The original construction of the international sexual subject has been challenged in some areas of international law, particularly in terms of decriminalisation of same-sex sexual acts and recognition of same-sex relationships, but it has been questioned less in-depth in relation to imprisonment. It is rarer to find recommendations or semi-judicial or judicial decisions by international bodies addressing the treatment of LGBTQ prisoners. The UN Standard Minimum Rules on the Treatment of Prisoners (SMR or Mandela Rules) and the European Prison Rules (EPR), the main *soft law* instruments concerning prisoners' rights, never explicitly mention sexual orientation or gender identity. On the other hand, the European Court of Human Rights (ECtHR) has advanced LGBTQ rights considerably and dealt with prisoners' rights in landmark cases that contributed to national reforms. Still, the international advocacy in this area relies on assimilationist aims. The Court has decided only one case concerning a homosexual prisoner so far. It condemned the respondent State for violating the prohibition of torture, inhuman or degrading treatment and the right of non-discrimination. I argue that this represents an initial step to thoroughly considering the systemic inequality facing LGBTQ people

in prison, yet the chapter stresses that the perpetuation of masculine normative paradigms and assimilationist strategies at the international level hinders the recognition of a legal “queer prisoner” in domestic jurisdictions.

Chapter 5 continues the analysis of the internalisation of human rights by providing an overview of the English and Italian prison legal frameworks, detailing the different constitutional mechanisms to integrate human rights into national prison law and policies. I focus on the way human rights have influenced the aims of imprisonment in both countries. England has developed – after the adoption of the Human Rights Act – a distinction between prisoners’ legal status in relation to the content of punishment, and prisoners’ residual liberty descending from the application of administrative policies. Courts clarified that the managerial approach qualifying the organisation of the English prison system cannot trump the respect of fundamental human rights. In Italy, the written Constitution stipulates the principle of rehabilitation as the main aim of imprisonment. However, the ECtHR has condemned the State for violation of the prohibition of torture in light of the critical conditions in the Italian overcrowded prisons, thus underlining that rehabilitation cannot be achieved without systemic reform driven by the respect of prisoners’ human dignity. In spite of the criticalities that emerge from the application of human rights standards, and attempts to integrate them through ambitious reforms in both jurisdictions, the result ended up being underwhelming, with limited openings in relation to LGBTQ-related rights in prison that failed to tackle the systemic inequality of the prison system.

Chapter 6 outlines my findings, illustrating how the normative foundations of international and national human rights, and the processes to internalise them have affected the lives of LGBTQ inmates.

In Section 6.1, I lay out the plurality of ways adopted by my participants to self-identify their sexual orientation and gender identity, and I contrast this kaleidoscope of narratives against the English Prison Service regulations at admission, and the absence of any official protocols in Italian penal estates. The “othering” of the homosexual and transgender subject leads to difficulties in organising inclusive practices of identification. I observe that stigma and prejudice on behalf of the prison staff do not facilitate the experience of coming out in prison, which is even more traumatic than outside for the reason that prisoners fear for their safety. Furthermore, the lack of appropriate training of prison staff causes officers to act sceptically towards prisoners who come out as LGBTQ for the first time after imprisonment.

Section 6.2 takes from comments on negotiating sexual orientation and gender identity from the point of entering prison to exploring how the initial “coming out” affects prisoners’ location, and consequently their life in confinement. In this section, I outline the different strategies provided by England and Italy to locate transgender and homosexual male prisoners. Regarding the former, the Section highlights the negative impact on transgender individuals of policies that in both countries – to

different degrees and with different procedures – heavily rely on a biological definition of gender and a medicalised conceptualisation of transgenderism and transsexuality. This risks leading to isolation practices and ultimately does not protect transgender, non-binary and gender non-conforming prisoners' well-being, physical and mental integrity. Regarding homosexual male prisoners, participants' accounts show how prison policies tend to support the toxic masculinity of male prisons by placing inmates who identify as gay in isolated, poorly served sections, while no real action is taken regarding closeted homosexual prisoners who are at high risk of abuse and stigma among the general prison population.

Section 6.3 elaborates on the negative consequences of prison conditions on LGBTQ inmates' health. The Section paints a portrayal of sexual minorities' struggle to access specialist treatments, particularly in the case of transgender people who wish to transition, or are undergoing a transitioning process, contrasting the formality of legal principles, such as the equivalence of care between prison and the outside world, and the reality emerging from interviewees' stories. The gender binary prison paradigm makes it hard for transgender prisoners to align with their preferred gender; paradoxically, they have to provide medical evidence of their gender identity to be recognised by prison officials. Another major problem concerns the lack of appropriate sexual health policies, due to a general ban on sexual activity. When this takes place anyway, prisoners do not always have the possibility to ask for condoms, for fear of disciplinary sanctions.

Section 6.4 analyses the consequences of isolation policies for LGBTQ prisoners who have been placed in special wings, alone or together with other vulnerable offenders depending on each prison's managerial choices. Isolation is justified by prison management on security grounds; however, the law states that it should not lead to denial of services and lack of access to rehabilitation programmes, contrarily to what the majority of transgender and male homosexual participants have reported. Although lesbian and transgender prisoners in female penal estate are generally mixed with the rest of the prison population, some of the interviewees pointed out how activities offered to them are highly gendered: even when the heteronormative binary paradigm avoids separating "the deviant subject," I discuss other forms of "othering" and stereotyping and patriarchal dynamics produced by State power.

Section 6.5 concerns a core issue of my inquiry, i.e. the relational dimension of prison life. Analysing participants' narratives, I was deeply interested in finding how the State power of surveillance models, limits and unexpectedly favours the creation of same-sex relationships, friendships, sexual contacts, or other interactions between prisoners, and between prisoners and the staff. The data analysed present an incredible richness: behind a general ban on sexual encounters, interviewees described how the definition of punishable contact is very loose depending on the prison staff's own beliefs, and on what ways relationships – not only of a sexual nature – can happen even in the most isolated space. Particularly in female prisons, this Section illustrates how the intersection between gender inequality, patriarchy and discrimination in society can lead some women to find the chance to explore their

sexualities more deeply in spite of the highly sex-controlled environment. Overall, I argue that the general ban on sexual activity, along with the lack of specific policies dealing with same-sex relationships inside prison, makes LGBTQ prisoners' lives unnecessarily more difficult, and prevents the tackling of episodes of abuse, (sexual) violence and sex trade appropriately. Without "queering" the legal principles of human dignity and privacy in relation to sexuality and gender diversity, the prison experience becomes uselessly cruel for LGBTQ inmates, and ultimately inhumane. The blanket policy of denying conjugal visitation programmes is a good illustration of the problematic foundations of the prison system.

My concluding chapter provides a final overview of the thesis as a whole. I review my research questions and address how my study has answered these in light of my findings. I focus on issues where my research has contributed to epistemological and methodological knowledge, particularly regarding the inherent queerphobia of the carceral system, the lack of recognition of prisoners' right to relate and intimacy, and the serious violations of transgender prisoners' fundamental rights. I will also address the limitations of my research, specifically in the choice of participant sample, and in the changes of my methodological framework due to the – sometimes extenuating – negotiations with the Prison Service. Finally, I will propose recommendations for future research and some reflections on my postdoctoral plans to continue my studies into this area at the intersection of gender, sexuality, criminology and the law.

## Chapter 2

### Literature review

The institution of punishment through incarceration represents a manifestation of the State exercising its normative power to control and discipline bodies who do not conform to societal accepted norms, via the application of the Benthamian theory of panopticism as described by Foucault, and later re-proposed by the carceral state in different versions.<sup>8</sup> Indeed, the panopticon exemplified a penal institution made by single cells constantly controlled from the top by prison guards, unseen by prisoners, who could not relate with each other. The segregation policy would force the inmates to reflect upon their conduct and become the subjects of a process of “normalisation” to prepare them for being re-introduced into society.<sup>9</sup>

As highlighted by recent analysis conducted by international institutions and national bodies,<sup>10</sup> the underpinning normative function of prison seriously affects the lives of inmates whose sexuality and gender do not conform with the heteronormative, gender binary paradigm regulating sexual bodies in society. In recent times, prison laws and policies have started dealing with the issues of LGBTQ prisoners. In parallel, the field of queer criminology has developed, criticising the absence of critical analysis regarding the condition of LGBTQ victims and offenders in criminology studies.<sup>11</sup> Specifically, LGBTQ<sup>12</sup> prisoners suffer from lack of recognition of their special needs from prison staff, forms of harassment, violence and discrimination from staff and other prisoners, separation practices leading to isolation from the general population and lack of

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<sup>8</sup> See Foucault, n.5.

<sup>9</sup> Helen Johnston, ‘Prison Histories, 1770s-1950s: Continuities and Contradictions’, in Yvonne Jewkes, Jamie Bennett, and Ben Crewe, *Handbook on Prisons* (II ed., Routledge New York 2016), at 30-31; Foucault, n.5, at 171-173.

<sup>10</sup> See e.g. United Nations Office on Drugs and Crimes (UNODC), *Handbook on Prisoners with Special Needs* (Criminal Justice Handbook Series, New York 2009), 103-122; Association for the Prevention of Torture (APT), ‘Towards the Effective Protection of LGBTI Persons Deprived of Liberty: A Monitoring Guide’, at [[https://apt.ch/content/files\\_res/apt\\_20181204\\_towards-the-effective-protection-of-lgbti-persons-deprived-of-liberty-a-monitoring-guide-final.pdf](https://apt.ch/content/files_res/apt_20181204_towards-the-effective-protection-of-lgbti-persons-deprived-of-liberty-a-monitoring-guide-final.pdf)], accessed 11 December 2019; Stati Generali sull’Esecuzione Penale, ‘Tavolo 6 – Mondo degli Affetti ed Esecuzione della Pena’, at [[https://www.giustizia.it/giustizia/it/mg\\_2\\_19\\_1.page](https://www.giustizia.it/giustizia/it/mg_2_19_1.page)], accessed 29 November 2019; Prisons & Probation Ombudsman, ‘Transgender prisoners often vulnerable and need better management by prison service, says Ombudsman’, 10 January 2017, at [<https://www.ppo.gov.uk/news/transgender-prisoners-often-vulnerable-and-need-better-management-by-prison-service-says-ombudsman/>], accessed 29 November 2019.

<sup>11</sup> Derek Dalton, ‘Reflections on the Emergence, Efficacy, and Value of Queer Criminology’, in Matthew Ball, Thomas Crofts and Angela Dwyer eds., *Queering Criminology* (Palgrave Macmillan 2015), 15-35; Jordan Blair Woods, ‘“Queering Criminology”: Overview of the State of the Field’, in Dana Peterson and Vanessa R Panfil eds., *Handbook of LGBT Communities, Crime, and Justice* (Springer 2014), 15-41; Carrie L Buist and Emily Lenning (eds.), *Queer Criminology. New Directions in Critical Criminology* (Routledge 2016).

<sup>12</sup> The acronym LGBTQ will be used in this thesis to identify all queer individuals who do not identify as heterosexual or cisgender. The term, although referring to a classification of identities that risks inevitably excluding certain expressions of identities and lived experiences, aims at symbolically considering the whole spectrum of sexualities and gender identities. I will use it across the thesis to facilitate the reader’s understanding by using a familiar terminology, while at the same time challenging this same language any time it is deemed necessary. The acronym is also purposely used to highlight the language adopted by national and international institutions, which make large use of labels such as LGBT, LGBT+ or LGBTQ, and deconstruct it whenever necessary. I prefer to use the term LGBTQ, since it better reflects the various way the participants to this study identify themselves, as I will address in the fieldwork findings chapter.

access to services, and physical and mental health issues due to lack of understanding – or willingness – to address their specific health care concerns.

In the next sections, I will explore the literature investigating the asymmetrical power relation between the State and “deviant” sexual and gender diverse subjects in confinement. I will review the literature on queer theory,<sup>13</sup> and its relation – including moments of contestation – with feminist theories,<sup>14</sup> gay and lesbian studies,<sup>15</sup> and transgender theory,<sup>16</sup> to explain why a deconstructionist queer approach is more apt to understand the disciplinary mechanisms of sexed bodies during imprisonment. I will examine through the lens of queer theory how the literature has addressed the construction of a legal sexed and gendered subject in international human rights and national law, and its importance for queer lives in confinement. Finally, by exploring the literature on prison sexualities and its link with criminological theories on rehabilitation, gaps and connections among disciplines will emerge that will inspire new reflections on the mechanisms of internationalisation of the human rights discourse within the prison system, and its impact on the living conditions of LGBTQ inmates.

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<sup>13</sup> For a discussion on the notion of queer theory, see Section 2.2.

<sup>14</sup> Ibid.

<sup>15</sup> According to many, particularly in the USA, the gay and lesbian movement dates back to the Stonewall riots of 1969, which signalled the rise of gay and lesbian identities as a political force, after gay, lesbian and transgender activists resisted a police raid in a New York gay and drag bar called the Stonewall Inn in 1969. Gay and lesbian activists’ fight against heteronormative oppression was crucial to highlight the struggle of marginalised groups such as gay and transsexual prisoners, at least in the first phase of the movement between the 1960s and 1970s. These groups developed a narrative in support of the political impact of declaring one’s homosexuality to the public – the so-called coming out – whose logics assumes that coming out is not only a private act, but has long-lasting public implications. Alongside gay and feminist movements, starting from the 1960s and 1970s, some lesbian women started developing an autonomous position. Lesbian activists denounced the sexism and homophobia intrinsic to other movements. Through the years, these movements shifted from a critique of universal heterosexual oppression to concentrate on advocating for specific battles, such as the recognition of same-sex relationships. In doing so, they embraced a strategy of assimilation and stabilisation of sexual orientations and identities, which leads to overlook marginalised groups within sexual and gender minorities. Queer theory will criticise the techniques of identification of categories, whose process is influenced by mechanisms of power reproducing stable identities to oppose the heterosexual subject. For further details, see e.g. Annamarie Jagose, *Queer Theory. An Introduction* (New York University Press 1996); Nikki Sullivan, *A Critical Introduction to Queer Theory* (New York University Press 2003); Jeffrey Weeks, *Sexuality* (4<sup>th</sup> ed., Routledge 2017); Dennis Altman, *Homosexual Oppression and Liberation* (Sidney, Angus and Robertson 1971); Sheila Jeffreys, ‘The Queer Disappearance of Lesbians: Sexuality in the Academy’ (1994), 17 *Women’s Studies International Forum* 5, 459-472; Michael Warner, *Fear of a Queer Planet: Queer Politics and Social Theory* (University of Minnesota Press, 7<sup>th</sup> printing, London 1993), 111 and following. On the emergence and evolution of a gay liberation movement in the USA, see also John D’Emilio, *Sexual Politics, Sexual Communities* (University of Chicago Press; 2nd Revised edition edition 1998).

<sup>16</sup> I use the word “transgender” by referring to Stephen Whittle’s argument that the word can be employed as an umbrella term to group all those individuals who are oppressed or discriminated against for not conforming to gender social roles; it includes cross-dressers, transsexuals, masculine women, effeminate boys and so on. Leslie Feinberg was the first to adopt it with this meaning in mind (Leslie Feinberg, ‘Transgender Liberation: A Movement Whose Time Has Come’, in Susan Stryker and Stephen Whittle eds., *The Transgender Studies Reader* (Routledge 2006), in order to highlight the goals of a new field of research attempting to interrogate the queer subject and let the complexity of gender emerge. In Stryker’s words, transgender studies seek to achieve “a different understanding of what bodies mean, how representation works, and what counts as legitimate knowledge” (Susan Stryker, ‘(De)Subjugated Knowledges: An Introduction to Transgender Studies’ in Susan Stryker and Stephen Whittle eds., *The Transgender Studies Reader* (Routledge 2006), at 8-9). In this sense, it can be located within the post-modern epistemological discourse, as it attempts to challenge the treating of gender as a mere “social subjective representation of the objectively knowable material sex” (Susan Stryker, *ibid*, at 8-9). The transgender movement has a complex relation with queer theorists and certain feminist streams, which will be explored in this chapter. See Stephen Whittle, ‘Where Did We Go Wrong? Feminism and Trans Theory— Two Teams on the Same Side?’, in Susan Stryker and Stephen Whittle eds., *The Transgender Studies Reader* (Routledge 2006); Stephen Whittle, *Respect and Equality: Transsexual and Transgender Rights* (Routledge, 2002).



## 2.1 Power discourses categorising sexuality and gender

The prison apparatus replicates a conceptualisation of sexuality and gender based on biological determinism. Indeed, the gender binary divide between male and female prisoners, and the sex prohibition policies which characterise the prison systems in England and Italy, embrace the fixity of sexualities and genders and symbolise the institutional resistance towards fluidities of identities and orientations.<sup>17</sup>

Feminist, gay and lesbian liberation and transgender movements have long demonstrated that what is considered a natural innate characteristic, is on the contrary imbued in social and cultural constructions. Plummer further states that “sexuality has no meaning other than that given to it in social situations.”<sup>18</sup>

To understand the forms of oppression – and consequent moments of resistance – involving LGBTQ inmates, it is thus necessary to focus on three main phenomena shaping our experience of social relations and their impact on self-representation of identities: the framing of social relations around a heterosexual/homosexual divide, which in turns uncritically accepts heterosexuality as the prominent category and excludes other sexual orientations and gender identities; the State’s disciplinary discourse concerning sexuality and gender; what relational arrangements are accepted in this context, and what this implies in case of deviation from the institutional norm.

Similarly to the general society, the prison system assumes heterosexuality as the norm, while homosexuality and non-cisgender identities represent the exception. This approach is rooted in the historical process that led to qualify heterosexuality as a natural, stable and undifferentiated construction, and homosexuality as derivative, thus making the hetero/homo divide asymmetrical.<sup>19</sup> An essentialist perspective considers homosexuality as equally innate as heterosexuality. On the contrary, a constructionist stance argues that the notion of homosexuality is historically located and dependant on the social context, when the homosexual subject began being identified in light of the same-sex sexual acts they practiced.<sup>20</sup>

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<sup>17</sup> On the notion of biological determinism, see Weeks, n.15, at 88. On the prohibition of sex, particularly the non-reproductive, outside of wedlock sex, see e.g. Gayle Rubin, ‘Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality’ (1984), in Abelove, H., Barale A. M., Halperin D. eds., *The Lesbian and Gay Studies Reader* (2012 Routledge).

<sup>18</sup> Ken Plummer, *Sexual Stigma: An Interactionist Account* (1975 Routledge & Kegan Paul Books), 32.

<sup>19</sup> Jagose, n.15, at 16; Weeks, n.15.

<sup>20</sup> Michel Foucault, *The History of Sexuality, Vol. 1- An Introduction* (1990 Vintage Books Edition). On the meaning and relatively recent development of the term “homosexuality”, see also David Halperin, *One Hundred Years of Homosexuality* (1990 Routledge). Foucault dates back the origin of the term “homosexual” to 1870 as a symbolic signifier of the historical connotation of terms used to define and categorise sexuality. Indeed, although this date appears to be conventionally established, most historians confirm that the first time specialists in sexuality studies coined the term “homosexual” can be traced to some point in the 19th century. The term homosexuality was introduced to describe a certain behaviour, rather than a way of being, in a neutral way. This does not mean that in the years before there was no awareness regarding the existence of various types of sexual desires, nor that there did not exist any cultural supra-structures elaborated to regulate gender identity and sexual orientation. Researchers like Sedgwick and Dall’Orto highlight the work of historians who identified several ways used to describe homosexuality in different historical periods. Sedgwick refers to it in order to affirm that it is impossible to enucleate a uniform notion of homosexuality in a given time, and that Foucault’s establishment of the conventional date of birth of the “homosexual” should not lead us to believe

Queer theory intends to disrupt these assumptions. Eve Sedgwick observes that the focus on hetero/homo classifications is doomed to fail, as such categories are inherently unstable. The homosexual identity presents inconsistencies that cannot be ignored. The heterosexual/homosexual divide originates another binary and contradictory distinction between a minoritising view, according to which these definitions are important only for a “relatively fixed homosexual minority,” and a universalising stance, according to which the issues of heterosexuality and homosexuality are of great importance for “people across the spectrum of sexualities.”<sup>21</sup>

The unproblematised heterosexual/homosexual binary risks creating further contradiction between transitivity and liminality, which determines a gendering of homosexual desire: transitivity characterises homosexuality as gender itself, while liminality produces a homosexual desire located at the borders between genders. In both cases, sexuality and gender tend to be conflated, whereas they represent two different things.<sup>22</sup> State power’s lack of problematisation of sexualities and identities causes a number of consequences within the prison context: for instance, homosexual inmates are treated as a fixed minority who can be kept separate from the presumed heterosexual population, yet subjected to a more disadvantaged prison regime. At the same time, prisoners who are not isolated must adapt to an environment which supposedly epitomises the heterosexual paradigm, imbued in hypermasculinity, therefore not accepting – or rejecting – any individuals who do not live up to this imposed normative standard.

Queering the dichotomy entails acknowledging that there are globalising arguments regarding minority interests, and localising arguments about quasi-universal interests.<sup>23</sup> It also requires a different engagement from criminology experts in relation to gender and sexuality in imprisonment, which in the past have prioritised the framing of the queer subject as a deviant individual, linking non-heterosexual sexualities with pathology.<sup>24</sup>

These arguments apply also to the heterosexual category, which is usually assumed to be one monolithic blueprint for all other orientations. This is especially problematic if – citing Foucault – sexuality represents a site of production of knowledge and discipline employed by the public authority to implement forms of institutional control. Such discourse relates to specific social norms, which promote an accepted vision of sexuality (e.g. traditional family, procreation) against practices that fail to conform to the norm, which needs

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that from the 19th century onwards, the construction of homosexuality was unilateral, rather than being characterised by a variability of fluctuating models. See Eve K. Sedgwick, *Epistemology of the Closet* (ed. 2008, University of California Press), Introduction; Giovanni Dall’Orto, *Tutta un’altra Storia. L’omosessualità dall’antichità al secondo dopoguerra* (2015 Il Saggiatore).

<sup>21</sup> Sedgwick, *Epistemology of the Closet*, *ibid.*, at 1-2.

<sup>22</sup> *Ibid.*, at 83-90.

<sup>23</sup> Warner, n.15. Ken Plummer, *Cosmopolitan Sexualities. Hope and The Humanist Imagination* (Polity Press Cambridge 2015).

<sup>24</sup> Dalton, n.11. Ferrell and Sanders have called for queer criminology to become part of “cultural criminology” as a field of study that aims to go beyond the gendered categorisations of crime, and can understand “the criminal worlds of lesbians and gays” besides the boundaries of heterosexual and masculine culture. The authors only speculate about this necessity, without adding further details on the methods to achieve this result. However, even if they are willing to explore ignored criminological categories, in my opinion they refer to these minority groups with a process of “othering” as compared to the male heterosexual criminal, thus reiterating a power dynamic where the male subject is dominant. See Jeff Ferrell and Clinton R Sanders, *Cultural Criminology* (Northeastern University Press, Boston, 1999).

disciplining as “deviant” or “abnormal.”<sup>25</sup> Identification of anomalies developed through the conceptualisation of sexuality in medical terms,<sup>26</sup> along with the rise of a movement of pathologisation of “irregular” sexual expressions.<sup>27</sup>

Hence, the Foucauldian paradigm describes a “healthy” heterosexual at odds with “perversions,” of which the homosexual represented a “new species” included in a medical narrative, stigmatised for who they are. This represented a changing approach from the legislation criminalising same-sex sexual acts (also called sodomy), which focused only on the behaviour rather than on the individual’s inner self.<sup>28</sup> Theorists such as Eve Sedgwick and Sara Ahmed reflect on the hostility towards the inclusion of the homosexual subject in the social framework and underline that heterosexuality is presented as the “compulsory orientation” based on the repetition of certain cultural mechanisms.<sup>29</sup>

This socio-cultural framework prevents us from analysing same-sex practices beyond negative or conforming classifications. They may be driven by homosexual desire, or also be determined by a specific social environment. Sedgwick labelled such activities as homosocial: they can be erotic in nature or cover a wider spectrum of sexuality functions.<sup>30</sup> Instead, in the context of prison, the prohibition of sexual acts and the marginalisation of LGBTQ minorities replicates the dynamics of criminalisation of homosexuality of the past, and show the State’s incapability to abandon a connotation of same-sex sexuality as deviant. Behind justifications based on public interest hides the revulsion towards non-conformity to sexual and gender rules which adds to prisoners’ breach of social conventions that led to their sentencing.<sup>31</sup>

The critique of feminist and queer writers towards naturalistic and universal constructions of the heterosexual/homosexual binary and the male/female divide<sup>32</sup> invites “a radical rethinking of many of the concepts we use to theorise social relations”<sup>33</sup> that opens possibilities also in the prison public space.

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<sup>25</sup> Foucault n.5, 61 and following. Rubin, n.17.

<sup>26</sup> Foucault, *ibid.*, at 105.

<sup>27</sup> *Ibid.*, at 38 and following. These included people who were diagnosed as mentally disturbed, or adjudicated as criminals by the legal system, or identified as not heterosexual.

<sup>28</sup> Foucault, n.20

<sup>29</sup> Sedgwick, n.20; Sara Ahmed, *Queer Phenomenology. Orientations, Objects, Others* (Duke University Press 2006), at 161.

<sup>30</sup> Sedgwick, *ibid.*

<sup>31</sup> On the notion of disgust in relation to same-sex sexuality, and its relation to queerness, see Senthorun Raj, ‘Disturbing Disgust: Gesturing to the Abject in Queer Cases’, in Matthew Ball, Thomas Crofts and Angela Dwyer eds., *Queering Criminology* (Palgrave Macmillan 2015), 83-102.

<sup>32</sup> Heteronormativity is a term introduced by queer theory in the 1990s to refer to the practices of normalisation of heterosexuality as universal and privileged, making it the norm over “non-normative” sexualities. The concept drew from the feminist critique of “compulsory heterosexuality”. See e.g. Diane Richardson and Surya Monro, *Sexuality, Equality and Diversity* (Palgrave Mac Millan, 2012), 16-17; Diane Richardson, ‘Bordering Theory’, in Diane Richardson, Janice McLaughlin and Mark Casey eds., *Intersections Between Feminist and Queer Theory* (Palgrave Macmillan, Hampshire, NY 2006), 19-37. Chrys Ingraham, *Thinking Straight. The Power, The Promise, and the Paradox of Heterosexuality* (Routledge London/NY 2005); Judith Butler, *The Gender Trouble: feminism and the subversion of identity* (New York: Routledge 1990); Francisco Valdes, ‘Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex”, “Gender”, and “Sexual Orientation” in Euro-American Law and Society’ (1995), 83 California Law Review 1, 1-377.

<sup>33</sup> Richardson, ‘Bordering Theory’, *ibid.*, at 32.

## 2.2 The relation between sex, gender and sexuality; critique of the gender binary essentialism

Queer criminologists argue that the “radical rethinking” of what society deems “normal” – appealing queer and some feminist theorists – must be thoroughly examined in the context of criminal justice, since the queer celebration of rebelling against the system may render the outsider a target of crime and violence.<sup>34</sup> That is why, to understand – and subvert – the mechanisms of marginalisation of LGBTQ identities within the prison complex, it is necessary to dwell on how feminism and queer theory are defined, and in what ways they question accepted dynamics between sex, gender and sexuality.

The feminist movements represent a multi-faceted experience, which was initially based on a “critique to essentialism”<sup>35</sup> and an examination of the woman category, and how to represent it.

Feminism gave relevance to the notion of gender as distinct from biological sex influenced by the social construction of sexed roles. By making use of the term gender to describe the social construction of masculinity and femininity as opposed to sex as a biological term, it separated the biological discourse from the social/psychological one. Simone de Beauvoir famously affirmed that one is not born, but rather becomes a woman, and that “social discrimination produces in women moral and intellectual effects so profound that they appear to be caused by nature.”<sup>36</sup>

Feminist scholars diverge in their identification of the site of social oppression, but unlike sexuality and masculinity studies, they focus more prominently on the role of women in society, while some 1970s feminists tended to have a negative view of sexuality as a “primary site of women’s oppression,” and had associated sexuality with gender.<sup>37</sup> Catherine MacKinnon affirmed that “feminism fundamentally identifies sexuality as the primary sphere of male power,” stipulating that sexuality is constitutive of gender.<sup>38</sup> In so doing, she nevertheless ended up replicating essentialist discourses, as the sexed body continued being framed in terms of oppressing male and oppressed woman.

Others called themselves “radical lesbians,” such as Monique Wittig. She advocated for the abolition of gender

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<sup>34</sup> Dalton, n.11; Blair Woods, n.11; Buist and Lenning, n.11. This is a core issue of debate in queer communities. On the tension between the historical high rate of punishment of sexual minorities, trans and gender non-conforming people for transgressing social norms, and the more recent investment of LGBT activists in Europe and North America in the state punishment of others, with a shift from the queer protest against the carceral state to a celebration of it as a “guardian of sexual citizenship,” see Sarah Lamble, ‘Queer Necropolitics and the Expanding Carceral State: Interrogating Sexual Investments in Punishment’ (2013), 24 Law Critique, 229 - 253.

<sup>35</sup> Annemarie Jagose, ‘Feminism’s Queer Theory’ (2009), 19 Feminism & Psychology 2, 157 – 174, at 160.

<sup>36</sup> Simone de Beauvoir, *The Second Sex* (Harmondsworth: Penguin 1972 [original 1949]), at 18. West and Zimmerman observe that a socio-constructive paradigm distinguishes sex from gender, attaching the former to the realm of biology, while the latter is ascribed to the psychological, cultural and social constructions: see Dave Ward and Gene Kassebaum, ‘Homosexuality: A mode of adaptation in a prison for women (1964), 12 Social Problems 2, 59-117. Gender is considered by some as “the cultural decline of the biological dimension of sex,” an integration of nature and culture: Alexander Hochdorn, Paolo Cottone, ‘Effects of agency on gender identity: discursive construction of gender violence within Italian prisons’ (April/September 2012), 36 Rivista Sessuologia 2-3.

<sup>37</sup> Chloe Taylor, *The Routledge Guidebook to Foucault’s The History of Sexuality* (Routledge 2017), 141-172.

<sup>38</sup> Catherine A Mac Kinnon, *Towards a Feminist Theory of State* (Cambridge, Ma: Harvard University Press, 1989), at 515.

categories, as they end up placing women in a subordinate position to men. She argued that lesbians are not women, because the term “woman” has meaning only within the heterosexual philosophical and economic paradigm. She challenged feminism, as in her view it leaves the heterosexual philosophy unquestioned, going beyond a reflection on sexuality and considering heterosexuality as a political force.<sup>39</sup>

Besides these quite radical visions, various feminist streams have developed through time, some of them much more open to pluralistic views in relation to gender and sexuality, and to interactions with queer and transgender theory.<sup>40</sup>

On the other hand, queer theory has a post-modernist approach to gender and sexuality aimed at problematising these categories. Inspired by Foucault’s work, queer theory criticises a system of power that strengthens the male position, both in the economic, political and personal sphere. Similar to Social Constructionist feminists,<sup>41</sup> it challenges the opposition of public and private, political and personal, market and life, but it goes further, questioning other classifications, such as the distinction between members of a group and non-members, sexual and non-sexual, the erotic and the familial. The concept of repression in queer theory is not only the repression of a subject, but the repression of sexuality, which acquires new significance as compared to feminist theories, usually more focused on gender as a social construct.<sup>42</sup>

So, what is it, exactly, queer theory, and in what ways is relevant to LGBTQ people within the CJS?

Queer theory has been broadly associated with “whatever is at odds with the normal, the legitimate, the dominant.”<sup>43</sup> However, it is not “an entirely empty signifier” and presents elements that can be shared and

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<sup>39</sup> Monique Wittig, ‘One Is Not Born a Woman’, in Carole R. McCann and Seung-Kyung Kim eds., *Feminist Theory Reader: Local and Global Perspectives* (New York: Routledge, 2013), 246-250. The lesbian feminist position emerged clearly in the 1980s with Adrienne Rich’s “Compulsory Heterosexuality and Lesbian Existence,” which argued that “all women exist on a lesbian continuum”. She saw lesbianism as something different from being a gay man, as lesbian women suffer the double exclusion of having a different sexual orientation and of a gender that is not male. In addition, Rich underlined class and economic oppression afflicting lesbian women more than homosexual men. Adrienne Rich, ‘Compulsory Heterosexuality and Lesbian Existence’ (1980), 5 *Signs* 4, 631-660.

<sup>40</sup> For more detailed information on feminism, see Chris Beasley, *Gender & Sexuality. Critical Theories, Critical Thinkers* (Sage Publications 2005); Joanne Conaghan, *Law and Gender* (Clarendon Law Series, Oxford University Press 2003); Mac Kinnon, n.38; Rosemarie Tong, *Feminist Thought: A Comprehensive Introduction* (Routledge, London 1995). Just as an example, more mainstream feminism did not accept lesbian radical feminism, as they perceived lesbian women as undermining the project to obtain equal rights for women: see Jagose, n.15, at 45. This stream of Western feminism - developed in the late 1970s-1980s – has been labelled as “Gender Difference” considering that it addressed primarily the question of gender, exploring the idea of different genders and considering the gender difference of women who do not identify with the mainstream universal narrative. There is a departure from the dichotomy men/women, and a stronger focus on the feminine as a cultural construct. On the other hand, Feminist Social Constructionists criticised the Gender Difference approach to identify difference in the identity/self, and went back to emphasise that difference is created by relations of power: people are marginalised because social structures of power make them different. Previous approaches were criticised as they continued being based on fixed notions of identity, although Constructionist Feminism acknowledges the possibility of potential stability of such categories.

<sup>41</sup> *Ibid.*

<sup>42</sup> See Warner, n.15, xxiii-xxv. On the interrelation between queer theory and feminist theory, particularly the post-modernist stream, see e.g. Richardson, n.32; Judith Stacey, ‘Feminist Theory: Capital F Capital T’, in Robinson, Victoria, and Diane Richardson, *Introducing Women's Studies: Feminist Theory and Practice* (2nd ed. Basingstoke: Macmillan, 1997).

<sup>43</sup> Halperin, n.20; Warner, n.15.

recognised.<sup>44</sup> When Teresa De Lauretis first introduced the term “queer,” her goal consisted of including intersectional elements, such as gender, race or class, deepening and re-positioning the debate on perversion and preference absorbing gay and lesbian studies at the time.<sup>45</sup> The inherent flexibility of queer theory represents at the same time a foundational element of it and a feature that makes it difficult to approach. Where Halperin believes that its flexibility remains important to go beyond discourses anchored in identity claims,<sup>46</sup> Dalton is worried that its roots “in a mixture of literary studies, post-colonial studies, cultural studies, performance studies, psychoanalysis, and deconstruction” cannot offer a practical framework for LGBTQ subjects entangled with the CJS to better their lives.<sup>47</sup>

I do not believe that queer theory theorisation of fluidity and instability of categories representing sexual and gender identity, and its resistance to the fixed categorisation of gay, lesbian, bisexual trans or intersex cannot have a substantial impact. The continual deconstruction and re-discussion of different minority groupings aims to avoid producing exclusionary practices within and among them. It has helped in challenging the divisive interpretations of the “gay man” and “lesbian woman” developed in the 1980s by gay and lesbian studies to acknowledge the existence of other minorities (e.g. bisexual and transgender people), while sexuality was contextualised also in relation to previously overlooked categorisations based on race or ethnicity.

Such profound interrogation of who is part of the queer community, making them visible, is crucially linked with the need – expressed by queer criminologists – to gather accurate information on LGBT (sic) people in the CJS.<sup>48</sup> Contextually, the investigation of the role of sexuality within power relations acquires great significance in the carceral system, where these components play a prominent role in shaping inmates’ lives and boundaries to interact.

Queer theory has offered new perspectives on how these interrelations can play out, by critiquing sexuality as an instrument to impose power dynamics of oppression, recalling social constructionism; but its postmodern character goes beyond the negative characterisation of the relationship between power and sexuality to

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<sup>44</sup> Richardson, n.32, at 20.

<sup>45</sup> Teresa De Lauretis introduced the term queer for the first time at the conference she organised at the University of California in 1990, and later on in an issue of *Differences* she edited. The term was introduced to keep a critical distance from the notions of “gay/lesbian” as used at the time. However, as De Lauretis clarifies, the term queer was suggested by her with no relation to the “Queer Nation” group. The term Queer Theory was arrived at in the attempt to go beyond the distinctions underpinning the concepts of “lesbian,” “gay” and their distinctiveness, and “gay and lesbian” as employed in different venues in a standardised form. See Teresa De Lauretis, ‘Queer Theory: Lesbian and Gay Sexualities. An Introduction’ (1991), 3 *Differences: A Journal of Feminist Cultural Studies* 2, i-xviii; Teresa De Lauretis, *Technologies of Gender: Essays on Theory, Film, and Fiction* (MacMillan 1989).

<sup>46</sup> Halperin, n.20; Jagose, n.37, at 159. Others, like Prosser, are more sceptical in affirming that queer theory failed to reach its de-structuring purpose.

<sup>47</sup> Dalton, n.11.

<sup>48</sup> Matthew Ball, ‘The ‘Prison of Love’ and Its Queer Discontents: On the Value of Paranoid and Reparative Readings in Queer Criminological Scholarship’, in Matthew Ball, Thomas Crofts, and Angela Dwyer eds., *Queering Criminology* (Palgrave Macmillan 2015), 54 - 82; Matthew Ball, ‘Queer Criminology, Critique, and the “Art of Not Being Governed”’ (2014), *Critical Criminology* 22, 21-34.

investigate the possibility that multiple sexualities become a source of pleasure rather than oppression.<sup>49</sup>

Foucault's reflections on sexuality as a discursive production of knowledge heavily influenced such a stance. He argued that not only is sexuality a site of oppression caused by the disciplinary power of the State and the law, but marginalised sexual identities are produced by those same mechanisms of power, noticing that this normative discourse keeps proliferating narratives around sex and sexuality rather than silencing them.<sup>50</sup> Therefore, the strategy of identity politics, based on assimilating these mechanisms to "repression" only manages to accept and reiterate these same mechanisms.<sup>51</sup> However, Foucault observed the presence of forms of resistance against disciplinary dynamics of power, as resistance is "contemporary" and "coexistent" with power: resistance is, like power, mutable and unstable.<sup>52</sup>

Furthermore, gender power dynamics cannot be overlooked. Indeed, feminist thinkers criticised Foucault's work for focusing exclusively on sexuality, avoiding consideration of the correlations between power and gender.<sup>53</sup> Chloe Taylor argues that Judith Butler, with her seminal work *Gender Trouble: Feminism and the Subversion of Identity*, made a fundamental contribution to fill the gap left by Foucault, while laying the foundations for queer theory's main arguments. Butler stipulates that gender acts as a regulatory construct that favours heterosexuality. Therefore, the category "woman" as developed by feminists inadvertently reproduces the same normative dynamics between sex, gender and desire that are derivative of a heteronormative paradigm. Gender is not based or elaborated upon sex, but is instead a cultural construct, "an identity [that] is performatively constituted by the very "expressions" that are said to be its results".<sup>54</sup>

These performative repetitions do not "consolidate the law but are nevertheless generated by that law," underlining the discursive rather than essentialist character of gender.<sup>55</sup>

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<sup>49</sup> See Beasley, n.40; Jagose, n.15; Warner, n.15. In exploring the dynamics between pleasure and oppression, queer theory engages heavily with psychoanalytic theories on sexuality, and looks at the work of Althusser, Freud, Lacan and Saussure to identify a post-structuralist operational framework.

<sup>50</sup> Foucault, n.20.

<sup>51</sup> Ibid, at 10-20.

<sup>52</sup> Ibid, at 122. However, Taylor observes that the notion of resistance was never explained by Foucault in his *History of Sexuality*. How should discourses on sexual identity produced by the State power be resisted? People seem to be subjected to the power-resistance dichotomy more than acting and producing it. Resistance appears to be generated involuntarily. In Foucault's thinking, it seems that one should first accept to be submitted to power dynamics that are upon its control before effectively resisting that same power. Taylor, n.37, 67-71.

<sup>53</sup> See Taylor, ibid, 141-173. In spite of the criticism, some feminist writers have interrogated themselves on the meaning of the term "woman" and its potential instability, thus adopting a post-structuralist methodology in assessing how gender is constructed in society (Riley 1988; Modleski 1991; Bordo 1990). For instance, positionality and intersectionality are considered in the work of Alcoff, who frames gender as positionality whereby "gender is, among other things, a position one occupies and from which one can act politically" (Alcoff 2006, at 148). The reproductive function of women here acquires a social meaning: even if a woman cannot give birth, she still is classified – positioned – differently than a man. Still, there is no shared essential gender among women, as their social position can differ; the positionality theory does not intend to go back to the sex (nature)/gender (culture) divide, but refers to reproductive possibilities as a generator of cultural and social phenomena (Alcoff 2006). Alcoff recognises the role of the "women" category, yet it remains open to the possibility that this category could encounter radical changes in time. See Linda Alcoff, *Visible Identities* (Oxford: Oxford University Press 2006).

<sup>54</sup> Butler, n.32, 10- 30.

<sup>55</sup> Jagose, n.15, 84-85. Butler, ibid.

A consequence of gender performativity and deconstructionist practices consists of questioning not only the stability of categories “other” than the heterosexual male, but also to engage in a critique of discursive powers productive of male heterosexuality. Authors such as Raewyn Connell and Judith Halberstam have used the term masculinity (or masculinities, in the case of Connell) to underline the social constructionist character of the category “male,” arguing for instance that not only male bodies, but also female ones, can be qualified as “masculine.”<sup>56</sup> Connell’s concept of masculinities relies on the premise that the physical and reproductive apparatus characterising the male subject is not a “blank surface” that can be informed on given social models;<sup>57</sup> nor that the masculine traits of the man’s body merely derive from genetic, biological factors.<sup>58</sup> Bodies engage in “doing gender” by relating to each other; the concept of masculinities presents an inescapable relational dimension which connects genders through a series of practices involving men and women that have an impact on the interrelated subjects’ bodily experience, culture and personality.<sup>59</sup> According to Connell, the body is “self-reflexive,” and the individual is both “agent and object” in their bodily interactions: sexual materiality should not be excluded in the analysis of gender performance.<sup>60</sup> The gendered construction of sexuality favoured the establishment of a hegemonic masculinity, but the institutional patriarchy model is not inflicted only on women, but also on non-masculine individuals.<sup>61</sup>

There is a connection between Connell, Foucault and Butler’s arguments: gender presents a social dimension that is rooted into a historical discourse; yet, gender identities are perpetually fluctuating projects or, in Butler’s words, they are performed constantly.

Stanley draws from this that “one’s gender identification and sexual identification are always formed in a series of thick relations to each other.” While we acknowledge that gender identity is not co-terminus with sexuality, these connections must be carefully attended to, as they cut through class, race, ability, and nationality, as well as time.<sup>62</sup>

Gayle Rubin adds that our understanding of sexuality and gender cannot disregard the State’s promotion of discourses based on sexual oppression and sex negativity, where “inappropriate” practices, such as

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<sup>56</sup> See e.g. Jack Halberstam, *Female Masculinity* (Duke University Press Books 1998); Raewyn W Connell, *Masculinities* (2nd Edition, Cambridge; Polity Press 2005). Connell is considered the principal theorist in the field of Masculinity Studies, which focus on analysing and interrogating the intricacies of the male category and its relation with other genders. Masculinity studies represent an articulated area of research which would be too broad to explore in this thesis. I decided to focus on particular arguments that contribute to the social constructionist/postmodern/queer approaches to gender and sexuality.

<sup>57</sup> Connell, *Masculinities*, *ibid.*

<sup>58</sup> Connell, *ibid.*, at 46.

<sup>59</sup> *Ibid.*, at 67 – 70

<sup>60</sup> *Ibid.*, at 61 and following. For example, a man may test a new sexual practice in life, such as having anal sex with a woman, and consequently wonder if he is potentially oriented to having sex with men, due to social assumptions usually linked with that sexual act.

<sup>61</sup> Connell, *ibid.*, at 77-81; Carl Stychin, *Law’s Desire* (London and New York, Routledge 1995).

<sup>62</sup> Eric Stanley, ‘Fugitive Flesh: Gender self-determination, Queer Abolition and Trans resistance’ (2011), in Stanley A E, *Captive Genders: Trans Embodiment and the Prison Industrial Complex* (Edinburgh, Oakland, Baltimore: AK Press 2011, at 5. On the positionality of gender, see Alcoff, n.53; Jagose, n.37, at 161. The positionality theory does not intend to go back to the sex (nature)/gender (culture) divide, but it refers to reproductive possibilities as a generator of cultural and social phenomena (Alcoff 2006). Alcoff recognises the role of the “woman” category, yet she remains open to the possibility that this category could encounter radical changes through time.



masturbation or sadomasochism, are rejected – even criminalised – as disgusting. Even if she claims that feminism, also when it calls for taking into consideration intersectional forms of oppression, is not adequate to challenge such reality,<sup>63</sup> Rubin’s critique remains inherently feminist, since it acknowledges that a gender order that is not oppressive can be achieved only by re-thinking, and challenging, the sexuality paradigm. To do so, feminist streams can be used as a platform to initiate a deconstructionist process.<sup>64</sup>

Nevertheless, Rubin argues that the theory of “gender oppression” cannot automatically be employed as the theory of sexual oppression, since gender and sexuality “are not the same thing,” in spite of the influence of gender on the sexual system.<sup>65</sup> Sexuality results in a complex of “acts, expectations, narratives, pleasures, identity-formations, and knowledges [...] that tends to cluster most densely around certain genital sensations but is not adequately defined by them.”<sup>66</sup>

Ultimately, sexuality is something different from gender, but also from biological sex. Ignoring this distinction, as it often emerges from the analysis of prison legal discourse, risks conflating these categories; the uncritical acceptance of binary codes marginalise identities and expressions not conforming to the (hetero)norm, pushing them to a constant negotiation with State power that rarely guarantees their visibility free from violence or sanctioning, and only for brief moments.

## 2.3 The representation of gender identities in transgender theory

Conflating narratives concerning sex, gender and sexuality informing the disciplinary power of prison authorities has tremendous repercussions on trans inmates, who fear disclosing their identity and suffer from a pathologising approach when they do.

In the past decades, the transsexual subject has always been analysed in relation to the medical discourse. Debating sexuality as a trans person involved explaining and justifying every bodily change they decided to undertake,<sup>67</sup> as they would represent an improper expression of gender to be disciplined through medical, social and legal norms aimed at fitting trans and gender non-conforming individuals into predetermined stable slots.<sup>68</sup>

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<sup>63</sup> Rubin, n.17.

<sup>64</sup> Gayle Rubin is not the only one to re-focus on the conceptualisation of sexuality in society. Michael Warner ascribes, among others, the works of Adrienne Rich, Eve Sedgwick, Judith Butler and Iris Marion Young in this attempt to “liberate” gender from logics of oppression. Warner, n.15, at x. Halley has talked of a “sex-positive/postmodernising” feminism, although she ultimately does not find interactions between Foucauldian and Feminist theory: Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton University Press, 2006). See also Jagose, n.37, at 165; Richardson, n.32.

<sup>65</sup> Rubin, n.17.

<sup>66</sup> Sedgwick, n.20, at 29.

<sup>67</sup> Stryker, n.16.

<sup>68</sup> Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (Duke University Press 2015).

Transgender studies attempt to reveal this disciplinary mode of control and present a complex, yet productive, relationship with queer and feminist theories. They intend to contest the systematic inequalities underpinning the neoliberal concepts of “freedom” and “choice,” refusing the assimilationist tendencies of gay and lesbian movements.<sup>69</sup> This leads to elaborate forms of resistance in Foucauldian terms, which are entrenched in the manifest intersectional victimisation of trans individuals. The articulation of gender identities is especially complex: specific experiences are attached to pre-transition and post-transition identities, while transitioning from male to female (MTF) or female to male (FTM) entails different repercussions.<sup>70</sup> Coming out as transgender – or simply talking about trans issues – can be particularly problematic, if not dangerous. Referring to his own personal history, Stephen Whittle recalls the risks of coming out as trans in light of social and legal restrictions, including entering the CJS.<sup>71</sup>

Other forms of gender expressions are not necessarily associated to a transitioning process, in spite of the discrepancy a person perceives between their biological sex and their preferred gender,<sup>72</sup> and they deserve recognition. Leslie Feinberg calls for inclusive transgender studies that can highlight the distinction between gender and sexual identities, while at the same time celebrating plurality and intersectional differences in terms of age, class, ethnicity beyond gender and sexuality.<sup>73</sup>

Intersectionality can be problematic even within minority groups. The transgender movement has clashed with certain – mostly radical – feminist streams, the latter being quite reluctant to abandon the distinction between the biological dimension of sex and the theorisation of gender as a social construct, to the point of considering transgender people as “impostors.” Janice Raymond was especially critical towards the transsexual experience and more generally on transsexual people, whom she described as “robots of an insidious and menacing patriarchy”.<sup>74</sup> In her view, feminists should have marginalised them because the medical process they undergo symbolises a re-making of the woman in man’s image. Furthermore, they were depicted as adherent to a programme of “colonisation” of feminine culture, which Raymond portrayed as a form of appropriation and even associated with rape.<sup>75</sup>

Gay and lesbian movements, and later on feminist authors and queer theorists, helped in overcoming such separation. Beyond Butler’s theorisation of gender performativity, Rubin addressed the relevance of gender

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<sup>69</sup> Id, at 22.

<sup>70</sup> See e.g. Judith Halberstam’s reflections on female masculinity, n.56. I here make use of the terms MTF and FTM, even if the transgender community increasingly prefers using a different terminology, such as assigned male or female at birth (AMAB/AFAB), since the acronyms MTF or FTM entail taking a biological approach to sex and gender. I decided to use them anyway in this thesis to reflect the position of my participants, who frequently refer to the MTF and FTM acronyms and were not aware of the debate around different definitions such as AMAB or AFAB.

<sup>71</sup> Whittle (2006), n.16.

<sup>72</sup> There are a number of personal accounts in the literature regarding transgender experiences of coming out and/or of transition. See e.g. Leslie Feinberg, *Transgender Warriors* (Beacon Press 1997). Sally Hines, *TransForming gender: Transgender practices of identity, intimacy and care* (Bristol: Policy Press 2007). Arlene Stein, *Unbound: Transgender Men and the Making of Identity* (Pantheon Books, New York 2018).

<sup>73</sup> Feinberg, *Transgender Warriors*, *ibid.*

<sup>74</sup> Stryker, n.16; Whittle (2002), n.16.

<sup>75</sup> Janyce Raymond, ‘Sappho by Surgery: The Transsexuality-Constructed Lesbian-Feminist’, in Susan Stryker and Stephen Whittle eds., *The Transgender Studies Reader* (Routledge 2006); Whittle (2006), n.16.

variance by noticing the presence of gender dysphoria in the lesbian community, and the overlap between lesbian and trans issues: she particularly observed that not only transsexuality, but also categories such as “woman, man, butch and lesbian” share a similar degree of imperfection and arbitrariness.<sup>76</sup>

The literature, particularly American and English, also underlines the commonalities existing between the feminist and transgender movements. Both fields aim at de-naturalising sex and gender categories, and denounce gender as a social justification for oppression. Whittle underlines the relevance of feminist streams in setting values directed to decrease the oppressive power of gender.<sup>77</sup>

Since the 1990s, transgender studies have benefitted from queer theory’s different interpretation of sex/gender categories. Transgender literature has focused on the importance of queer theory in introducing the idea of fluidity of genders, as well as of instability of sexes, in the post-modern public debate.<sup>78</sup> However, by positioning at the intersection of feminist and queer theory, transgender studies contribute to overcoming what some transgender activists and academics identify as a tendency in queer studies to privilege homosexual ways of distancing from heterosexual norms.<sup>79</sup> More generally, they help in assessing the difference between gender identity and sexual desire and challenge attempts to conflate these categories.<sup>80</sup>

In this perspective, Prosser’s analysis of early queer thinkers’ projects highlights the presence of elements of transgender thinking underpinning their epistemological assumptions, if only because they were characterised by the crossing and cross-fertilisation of different methodologies and identities.<sup>81</sup>

Queer theory has also faced some criticism. Notably, Butler’s considerations on gender as performance in *The Gender Trouble* have been interpreted as supporting the concept of gender as a fictional construct. Butler subsequently clarified that the idea of performativity does not entail the theatricality of gender, considering that the latter cannot be chosen at will. Contrariwise, gender performance originates from a productive repetition of the bodily discourse, a citation that renders sex itself a construct translated into a gendered

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<sup>76</sup> Gayle Rubin, ‘Of Calamities and Kings. Reflections on Butch, Gender and Boundaries’, in Susan Stryker and Stephen Whittle eds., *The Transgender Studies Reader* (Routledge 2006). Feminist authors, for example Surya Monro and Sally Hines, have critiqued the work of other feminist thinkers like Raymond and laid the foundations for alliances to be built between movements. See Sally Hines, n.72; Surya Monro, ‘Transgender: Destabilising Feminism?’ (2007), in V. Munro, & C. Stychin (Eds.), *Sexuality and the Law: Feminist Engagements* (Routledge Taylor & Francis Group), 125-149.

<sup>77</sup> Whittle (2006), n.16.

<sup>78</sup> Damian A. Gonzalez-Salzberg, ‘The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of Sex/Gender by the European Court of Human Rights’ (2014), 29 *American University International Law Review* 4, 797-829; Strycher, n.16; Judith Butler, *Undoing Gender* (New York, Routledge 2004); Judith Butler, ‘Doing justice to Someone: Sex Reassignment and Allegories of Transsexuality,’ in Susan Stryker and Stephen Whittle eds., *The Transgender Studies Reader* (Routledge 2006).

<sup>79</sup> Strycher, n.16.

<sup>80</sup> Concerning the conflation between sex and gender in the legal and prison context, see e.g. Darren Rosenblum, “‘Trapped’ in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism” (2000), 6 *Michigan Journal of Gender and Law* 499; Dylan Vade, ‘Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People’ (2005), 11 *Michigan Journal of Gender & Law* 253, 316; Alexander Schuster, ‘Gender and Beyond: Disaggregating Legal Categories’, in Alexander Schuster (eds.), *Equality and justice: sexual orientation and gender identity in the XXI century*, (Udine : Forum, 2011), 21-40.

<sup>81</sup> Jay Prosser, ‘Judith Butler: Queer Feminism, Transgender, and the Transubstantiation of Sex’, in Strycher, S. and Whittle, S. (ed.), *The Transgender Studies Reader* (Routledge: London, 2006), 257-280.

heterosexual subject. Gender thus becomes a site of prohibition, whose materiality influences the subject who cannot be if not in accordance with the repetition of the body.<sup>82</sup>

Additionally, Butler specified that performativity does not equate with transgenderism, and consequently transgender identity does not conflate into homosexuality. This was beneficial to address the critiques concerning queer homonormativity. I believe that Butler's reflection on the existence of moments of convergence and divergence among post-modern theories, and the importance of their constant dialogue,<sup>83</sup> should be kept in mind to fully represent the experiences of queer minorities caught within the carceral complex.

## 2.5 The legal representation of sexuality and gender

The Foucauldian discourse on power and resistance, along with the queer critique to categorisations of sexuality and identity based on heteronormative paradigms, involves also the legal discourse. The role of law and policies in defining gender and sexuality cannot be ignored in a prison context characterised by sex negativity and essentialism.

The literature has questioned the consequences of practices of legal classification on sexual and gender minorities' lives. It has interrogated how the relational dimension of sexual orientation and gender identities is framed through the legal discourse; and whether the international human rights discourse introduces new elements of disruption to the disciplinary power of prison law, or on the contrary reiterates mechanisms of hierarchisation.

On the first point, post-structuralist studies question the legal process of categorisation that leads to regulate a universal, normalised subject, while actually calling for the exclusion of the undesired and the production of coherent sexualities.<sup>84</sup>

The legislator regulates "deviances," yet it also produces previously unnamed realities the moment it identifies them through a rich vocabulary.<sup>85</sup> The terminology used is, however, not neutral. Classifying through exclusion establishes interconnections among groups based on power relations,<sup>86</sup> and distinguishes between acceptable and non-acceptable sexual archetypes. Someone is human to the extent that their desire is deemed recognisable; to be acknowledged, the subject needs to conform to a given normative framework of acceptability.<sup>87</sup>

Thus, on one side legislation and judicial decisions can explicitly act as forces of repression and social

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<sup>82</sup> Butler, n.78.

<sup>83</sup> Id., at 35.

<sup>84</sup> Stychin, n.61. On the potential of a queer legal analysis, see also Maria Rosaria Marella, "Queer Eye for the Straight Guy": Sulle Possibilit  di un'analisi giuridica queer' (2017), 3 *Politica del Diritto*, 383-414.

<sup>85</sup> Foucault, n.5.

<sup>86</sup> Butler, n.32, at 98.

<sup>87</sup> Butler, n.78, at 32 and following.

control;<sup>88</sup> on the other hand, the regulation of desire and relationships preserves a coherent legal framework. However, coherence does not necessarily entail inclusiveness; therefore, legal normativity justifies resistance against the blockage of any forms of subversion to the convention, a resistance which queer and trans theory seek to use to destabilise the (hetero)norm.<sup>89</sup> Nonetheless, queer criminologists cautiously warn that anti-accommodation instances should not alienate queer communities from the assistance of police officers that they may necessarily need for protection.<sup>90</sup>

The gender binary foundation of law affects also the recognition of transgender rights. The distinction between sex and gender in the legal discourse, where sex is connected to biology and gender is represented as a social construct, implies that sex is interpreted as a more important category than gender because of its material nature. This makes the position of transgender people harder to defend through the law, unless it does comply with processes of medicalisation.<sup>91</sup> Foucault believed that the disciplinary power affected gender in the same way as other norms. Instead, Butler stipulates that the power that produces gender is in itself gendered. When we say that being transgender is different from being masculine or feminine, we are already comparing gender identity to fixed categories. No one “is” a transgender individual or “has” a gender identity, since gender is a system that produces the masculine and the feminine, in various ways, for example via medical or psychological instruments that help shaping gender.<sup>92</sup> This type of construction, which can be found in the gender binary prison system, restricts the possibilities of expressing gender, and represents a specific regulatory process.

However, the law clearly tends to look for unity and uniformity and refers to a set of axioms that is as limited as possible. Legal patterns based on binary division extends to private/public, heterosexual/homosexual, inside/outside.<sup>93</sup>

In particular, Schuster argues that the legal agent, whom he calls “homo juridicus”, has ended up being a white heterosexual male, consequently excluding from the legal paradigm every subject who does not match this description. The legal dualism has been based on an undefined notion of sex founded on naturalistic assumptions, and even when the female subject became more legally detailed, the essentialist paradigm has reiterated a form of sexual discrimination.<sup>94</sup>

A powerful classification criterion relies on biological reproduction, to which Western society attaches a primary role as the main purpose of sexual activity. This affects the definition of desires that must be ostracised,

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<sup>88</sup> As demonstrated by the enactment of the so-called “anti-sodomy” laws, which prohibit same-sex sexual acts to various degrees, or by legal provisions stigmatising practices such as sadomasochism or BDSM.

<sup>89</sup> Stychin, n.61; Carl Stychin, ‘Same-Sex Sexualities and the Globalization of Human Rights Discourse’ (2004), 49 McGill Law Journal, 951-968, at 967-968. Butler, n.32, at 201; Stryker, n.16.

<sup>90</sup> Dalton, n.11; Ball, n.48.

<sup>91</sup> Vade, n.80; Anna Lorenzetti, ‘Carcere e transessualità: la doppia reclusione delle persone transgeneri’ (2017), 1 GenIUS, 53-69; Stephen Whittle, Lewis Turner and Maryam Al-Alami, *Engendered Penalties: Transgender and Transsexual People’s Experiences of Inequality and Discrimination* (Press for Change, 2007).

<sup>92</sup> Butler, n.78.

<sup>93</sup> Stychin, n.61.

<sup>94</sup> Schuster, n.80.

as laws embrace social processes aimed at forbidding any practices “of kinship” not directed to reproduction. Also certain heterosexual practices must be excluded in light of the reproductive paradigm, while homosexuality results implicitly in being stigmatised by being entrenched within the wider group of heterosexual non-conforming relations.<sup>95</sup> The reproductive legal norm oversees every aspect of individuals’ lives by using the language of sexuality, which establishes a social individual made by norms and depending on them at the same time.<sup>96</sup> The power of law exercises a moral judgment on conducts that do not necessarily cause harm, for instance prohibiting sex in prison in any circumstances, with similar normative foundations that led to criminalising “unnatural conducts” through criminal legislation.<sup>97</sup>

This approach excludes complexity and does not consider intersectional aspects among diverse, yet linked, phenomena. It has influenced the way notions such as equality, non-discrimination and privacy have been interpreted in the legal discourse. Considering the fundamental role these principles have played in recognising and protecting sexual minorities’ instances, Stychin calls for a review of these foundational grounds, in order to evaluate how they are held by the subject, and preliminarily, how the subject is constructed through them.<sup>98</sup>

An example of such indeterminacy can be found in the legislator’s attempts to draft anti-discrimination laws through lists of protected categories that are never exhaustive, as there is always room for additional classes deserving recognition,<sup>99</sup> while sexual orientation and gender identity, if selected as protected characteristics, are assessed in light of a heteronormative, essentialist paradigm.

It follows that when the State addresses sexuality and gender identity – including in the legal context – LGBTQ people are accepted only to the extent they can be “assimilated”: the State can end up acknowledging same-sex marriage as it makes certain types of homosexual and lesbian people acceptable. Yet, “a range of identities and policies that have refused to conform to State-endorsed normative homo or heterosexuality” remain vulnerable and ostracised.<sup>100</sup>

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<sup>95</sup> Rubin, n.17; Ball, n.48.

<sup>96</sup> Butler, n.32, at 100 and following; Butler, n.78, at 32 and following.

<sup>97</sup> This tension has animated the debate on the scope of criminal law since the time of John Stuart Mill and James Fitzjames Stephen. Where Mill argued for a criminal law that should punish only harmful conducts without exercising a form of moral judgment, Stephen believed that moral constraints are beneficial to society and should be reflected in legal provisions due to their persuasive power. See Allison Jernow, ‘Morality Tales in Comparative Jurisprudence: What the Law Says About Sex’ (2011), 3 *Amsterdam Law Forum* 2.

<sup>98</sup> Stychin, n.61, at 15-20.

<sup>99</sup> Butler, n.32, at 196 and following.

<sup>100</sup> Katherine Franke, ‘Sexual Rights and State Governance’, *Proceedings*, 104th Annual Meeting, 24 March 2010, Vol. 104, 385-388; Katherine Franke, ‘Gender, sex, agency and discrimination: a reply to Professor Abrams’ (1998), 83 *Cornell Law Review* 5, 1245-1256. On the question of assimilation of gay and lesbian people, see Lisa Duggan, *The Twilight of Equality?: Neoliberalism, Cultural Politics, and the Attack on Democracy* (Beacon Press 2002); Ayel Gross, ‘Post-Colonial/Queer Globalisation and International Human Rights’, in Oishik Sircar, Dipika Jain eds., *New Intimacies, Old Desires: Law, Culture and Queer Politics in Neoliberal Times* (Zubaan 2017). Lisa Duggan coined the term “homonormativity” to criticise a neo-liberal approach embraced by certain streams of the gay liberation movement that supports a depoliticised gay culture entrenched in privatisation and domesticity, where the heteronormative paradigm is accepted, remaining uncontested. On the shifting of the legal discourse from a homosexual subject connoted by promiscuity and disease – thus ostracised – toward an assimilationist legal discourse where the homosexual is absorbed in the heteronormative paradigm, see Chris Ashford, ‘(Homo)normative Legal Discourses and the Queer Challenge’ (2011), 1 *Durham Law Review*, 77-98.

Butler argues for a strategy of resistance against fixed sexed classifications based on finding elements of connection between movements: for instance, phobic violence against the bodies represents the *trait d'union* among anti-homophobic, anti-racist, feminist, trans and intersex movements.<sup>101</sup>

## 2.6 The contribution of human rights norms in shaping notions of (sexual and gender) equality and diversity

Modern States shall consider human rights norms to formulate discourses on sexuality, gender and confinement. Particularly in the European context, they are expected to recognise sexual minorities and different gender identities.<sup>102</sup> But what kind of protection are they required to afford, and to whom?

The problem is twofold: it is necessary to interrogate whether human rights law is essentialist and heteronormative in its foundations; and whether the internalisation of human rights in national settings has merely reiterated heteronormative assumptions on gender and sexuality, or on the contrary if the human rights discourse can represent an exogenous factor of “queerness” within the prison complex.

On the first point, the dichotomy private/public cited in the previous section has been discussed at length by feminist theory, gay and lesbian studies and queer theory to understand the development of international human rights from a male-driven perspective to a more nuanced approach, as well as the reason why international human rights standards continue to be lacking in terms of inclusivity of diverse groups.

The recognition of sexual orientation and gender identity (SOGI) in international law draws from the Preamble to the Universal Declaration of Human Rights: “Everyone is born equal in dignity and rights”.<sup>103</sup> The relationship between identity formation, recognition and rights has been made further explicit by the Yogyakarta Principles, which have integrated SOGI into the main human rights legal framework, in spite of criticism for what is considered by some as a missing opportunity to really subvert the inherent heteronormativity and essentialism of international law.<sup>104</sup>

However, there remains a tendency within international bodies to read sexuality and gender diversity in essentialist and heteronormative terms, which determines the construction of the principle of universality as ultimately not “universal” at all. “Queering” the “universal” let emerge a “particular” representation of the

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<sup>101</sup> Butler, n.78, at 41-42.

<sup>102</sup> See e.g. Katharine Franke, ‘Dating the State: The Moral Hazards of Winning Gay Rights’ (2012), 44 *Columbia Human Rights Law Review* 1, 1-46.

<sup>103</sup> Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)), Preamble.

<sup>104</sup> See e.g. Michael O’Flaherty, ‘The Yogyakarta Principles at Ten’ (2016), 33 *Nordic Journal of Human Rights* 4, 280; Franke, n.102. For a critical stance regarding the Yogyakarta Principles, see Tom Dreyfus, ‘The “Half Invention” of Gender Identity in International Human Rights Law: from CEDAW to the Yogyakarta Principles’ (2014), 37 *Australian Feminist L J* 45; Diane Otto, ‘International Human Rights Law: Towards rethinking Sex/Gender Dualism and Asymmetry’ (2013), in Davies and Monro, *A Research Companion to Feminist Legal Theory* (Ashgate 2006); Ayel Gross, ‘Sex, Love, and Marriage: Questioning Gender and Sexuality Rights in International Law’ (2008), 21 *Leiden Journal of International Law* 1, 235 – 253, at 249 – 250;

legal subject, which presents gendered, heteronormative and Western-liberal characteristics.<sup>105</sup> Also human rights law usually defines society through oppositional categories and classifications: the legal definition of sexualities and identities needs to re-focus on the notion of humanity rather than reiterating the heterosexual/homosexual binary while representing sexuality in terms of gender.<sup>106</sup>

The evolution of the international feminist movement may offer guidance on how to achieve this goal.

After the first wave of feminism saw liberal feminists calling for achieving equality through legislation,<sup>107</sup> a debate arose among those who wished for women rights to be integrated in existing human rights, by treating men and women as equal human beings on the basis of the non-discrimination principle, and those who advocated for treating women's rights as special rights.<sup>108</sup> The tension between non-discrimination and special protection continued in the following decades. However, starting from the 1990s many feminists acknowledged the failure of liberal feminist ideas of reaching "sameness" through formal equality by using legislative documents,<sup>109</sup> as this model brought to identify fundamental values through a patriarchal, androcentric approach. The shift from the State to the human paradigm has developed through an unbalanced process that has kept men in greater consideration than women, while the human rights construction has ended up overlooking experiences and phenomena especially relevant to women, such as sex discrimination and sex equality.<sup>110</sup>

Such self-criticism led the feminist critique of gender in international law to become a platform for extending the methodology used to study gender and its relation to the law to include reflections on sexuality, gender identity and masculinity. Gender started to be analysed as part of a more complex system that considers intersecting inequalities,<sup>111</sup> while feminist – and more recently queer – theorists seek to unveil a different

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<sup>105</sup> See e.g. Diane Otto, 'Queering Gender [Identity] in International Law' (2015), 33 *Nordic Journal of Human Rights* 4, 299; Michele Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003), 14 *European Journal of International Law* 5, 1023; Ratna Kapur, 'The Impossibility of Queering Human Rights', in Diane Otto ed., *Queering International Law – Possibilities, Alliances, Complicities, Risks* (1st ed. Routledge 2017); Gonzales-Salzberg, n.78, at 371. Catherine MacKinnon was among the first scholars of international law to develop a critique of the masculinity of law, underlining the marginalisation of the woman subject: see e.g. MacKinnon, n.38, 161-2: 'The state is male in the feminist sense. The law sees and treats women the way men see and treat women.' Joanne Conaghan acknowledges that law sometimes creates opportunities for women, but she cites Carol Smart's arguments in *Feminism and the Power of Law* when noticing that the law develops unevenly and not always consistently in relation to the interests it supports: 'If law can be said to favour one particular group more than others, whether in terms of distributive outcomes or general standpoint, it is probably white, middle-class, heterosexual, able-bodied men who are favoured, but to acknowledge this is far from establishing that law is resolutely and unconditionally male.' See Conaghan, n.40, at 76.

<sup>106</sup> Sedgwick, n.20, at 8-9. Stychin reiterates that law works through binary categories to define gender (male/female) and sexuality (heterosexual/homosexual), producing coherent sexualities. See Stychin, n.61.

<sup>107</sup> Laura Parisi, 'Feminist praxis and women's human rights' (2002), 1 *Journal of Human Rights* 4, 571-585.

<sup>108</sup> Leila Rupp, *Worlds of Women: The Making of an International Women's Movement* (Princeton: Princeton University Press 1997), 105; Marilyn Lake, 'From self-determination via protection to equality via non-discrimination: defining women's rights at the League of Nations and the United Nations' (2001), in Patricia Grimshaw, Katie Holmes and Marilyn Lake eds., *Women's Rights and Human Rights: International Historical Perspectives* (Great Britain and New York: Palgrave 2001), at 255.

<sup>109</sup> Parisi, n.107, at 577.

<sup>110</sup> Hillary Charlesworth and Christine Chickin, 'The Gender of Jus Cogens' (1993), 15 *Human Rights Quarterly*, 63-76.

<sup>111</sup> Conaghan, n.40, at 74. The concept of intersectionality underlines the many forms of inequality characterising societies on grounds of a number of characteristics that tend to combine in particular ways, rather than emerging individually. On intersectionality theory, see e.g. Nira Yuval-Davis, 'Intersectionality and Feminist Politics' (2006), 13 *European Journal*



understanding of human rights as relational, discursive and constantly changing in light of particular situations or constraints,<sup>112</sup> including deprivation of liberty.

This entailed questioning the liberal ideological foundations of the principle of inalienability and universalism at the basis of the notion of human rights. The concept of “sameness” never truly takes into account that non-heterosexual non-masculine experiences can be qualitatively different; furthermore, the human rights discourse has lost “its claims to universal applicability,” as such universality has never been fully “universal” for certain categories of people.<sup>113</sup> More so, the concept of universality is undermined if placed under the control of the State unless the fact that the public authority can be an agent of inequalities is addressed.

Henceforth, more recent feminist streams moved from the concept of sameness to the idea of gender mainstreaming, i.e. by including gender-specific abuses in the mainstream discourse of human rights.<sup>114</sup>

Yet, advocates for gender mainstreaming do not necessarily embrace instances coming from sexual minorities, transgender and gender non-conforming individuals, since they promote “risky” subjects, especially in light of relativistic movements’ critiques against any forms of acceptance concerning sexual diversity, mainly based on religious and moral rather than legal arguments.<sup>115</sup> Instead, queer theory seeks to reinterpret the notion of universal human rights by deconstructing its linear and heteronormative connotation, embracing the potential of emerging new categories and subverting existing hierarchies.<sup>116</sup>

The contribution of post-structuralist critiques to the human rights discourse highlights two main points of debate concerning the recognition of gender and sexuality: the clash between assimilationist movements, which aim for rights that make the non-heterosexual subject “respectable” to legally protect, and queer and trans theorists who instead observe that this strategy forces the “othering” of marginalised minorities, such as LGBTQ prisoners.

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of Women’s Studies; Sylvia Walby, ‘Complexity Theory, Systems Theory, and Multiple Intersecting Social Inequalities’ (2007), 37 *Philosophy of Social Sciences* 4, 449-470.

<sup>112</sup> Sonia Correa, Rosalind Petchesky & Richard Parker, *Sexuality, Health and Human Rights* (New York: Routledge 2008). The same Yogyakarta Principles, in spite of their inclusive purpose, have been criticised for adopting an American, Western European approach to gender and sexuality. The Principles assume that everyone understand themselves to have a sexual orientation and a gender identity, and that this sense of self is a core component of who they are. See e.g. Matthew Waites, ‘Critique of “sexual orientation” and “gender identity” in human rights discourse: global queer politics beyond the Yogyakarta Principles’ (2009), 15 *Contemporary Politics* 1, 137; Franke, n.102; Elisabeth Baisley, ‘Reaching the Tipping Point?: Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity’ (2016), 38 *Human Rights Quarterly*, 134-163.

<sup>113</sup> Charlesworth & Chinkin, n.110. Plummer, n.23.

<sup>114</sup> This approach seems to reflect the emergence of 1990s sexual politics which redefined the aims and strategies of LGBT activism in reformist rather than transformist terms. See Richardson and Monro, n.32, at 17. Parisi, n.107; Otto, n.104.

<sup>115</sup> Wendy O’Brien, ‘Can International Human Rights Law Accommodate Bodily Diversity?’ (2015), 15 *Human Rights Law Review*, 1; Carmelo Danisi, *Tutela dei diritti umani, Non discriminazione e Orientamento sessuale* (Ed. Scientifica 2015); Parisi, n.107.

<sup>116</sup> Correa and others, n.112; María do Mar Castro Varela and others, ‘Introduction’, in María do Mar Castro Varela, Nikita Dhawan & Antke Engel (eds), *Hegemony and Heteronormativity: Revisiting ‘The Political’ in Queer Politics* (Surrey, Ashgate Publishing 2011).

A second concern relies on the struggle of going beyond the notion of privacy and defining what equality, human dignity and non-discrimination really mean. Recognising gender and sexuality rights on the basis of equality implies stressing the respect for difference beyond the recognition of someone's right to have sex, which is what the case law on decriminalisation of homosexuality based on the right to privacy was ultimately about.<sup>117</sup>

Indeed, the development of a right to sexuality within international human rights has increased safeguards for LGBTQ people by focusing on the individuals' sexual life,<sup>118</sup> shaping the way concepts such as "sexual orientation," "sexual identity" or "gender identity" are employed within international institutions.<sup>119</sup> Decriminalisation of homosexuality was based on the principle of privacy to protect sexual minorities from State intrusion, but at the same time privacy "contained gestures of disgust".<sup>120</sup> Although privacy has been central to achieve decriminalisation, it has also closeted queer intimacies,<sup>121</sup> at least until sexuality was "normalised" through inclusion in the stable notion of family.

It is true that European institutions have made relevant progress in identifying a set of rules based on non-discriminatory principles together with privacy to favour the protection of sexual orientation and focus on a gender-neutral approach, particularly in the field of family law and parenthood. Their attention to SOGI has been supported by a shift in language aimed at expanding the legal use of the terms gender and gender identity.<sup>122</sup>

Still, such openings could undergo a process of queering. For instance, gender neutrality did not prevent the Court from considering female sexuality principally in relation to reproduction.<sup>123</sup> When analysing the body of jurisprudence of the ECtHR, Gonzales-Salzberg appears cautious in depicting the evolution of the Court's interpretation of the sex category in connection with transgender rights, stating that the Court "has certainly

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<sup>117</sup> Jernow, n.97, at 18. Gonzales-Salzberg and Johnson reflected on the elaboration of the right to private life in order to include homosexuality by the European Court of Human Rights, reaching different conclusions on the Court's qualification of sexual orientation as identity or behaviour. See Damian Gonzales-Salzberg, *Sexuality and Transsexuality under the European Convention of Human Rights – A Queer Reading of Human Rights Law*, (Hart Publishing, 2019); Paul Johnson, *Homosexuality and the European Court of Human Rights* (Routledge 2013).

<sup>118</sup> Helmut Graupner, 'Sexuality and human rights in Europe', in Helmut Graupner and Phillip Tahmindjis, eds., *Sexuality and human rights: a global overview* (New York: Harrington Park Press 2005), 107–139; Michael O'Flaherty and John Fisher, 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles' (2008), 8 Human Rights Law Review 2, 207.

<sup>119</sup> For an analysis of the various ways these terms are used in the international context, see e.g. Anthony J Langlois, 'Conceiving human rights without ontology' (2005), 6 Human Rights Review, 5-24; Robert Wintemute, 'From 'sex rights' to 'love rights': partnership rights as human rights'. In N. Bamforth, ed. *Sex rights: Oxford Amnesty lectures* (Oxford: Oxford University Press 2005), 186–224; Graupner, 'Sexuality and human rights in Europe', *ibid*; Waites, n.112; Carl Stychin, *Governing sexuality: the changing politics of citizenship and law reform* (Oxford, Hart 2003); Grigolo, n.105; O'Brien, n.115; Danisi, n.115.

<sup>120</sup> Raj, n.31.

<sup>121</sup> Raj, *ibid*; Stychin, n.61. Regarding the development of legal protection of homosexuality at the ECtHR on the basis of the right to privacy, and the consequent perpetuation of the narrative of "the closet" that enables "the politics of disgust," see Johnson, n.117; Angioletta Sperti, *Constitutional Courts, Gay Rights and Sexual Orientation Equality* (Hart Publishing 2017), at 26-29.

<sup>122</sup> Schuster, n.80.

<sup>123</sup> Loveday Hodson, 'Sexual orientation and the European Convention on Human Rights: What of the "L" in LGBT?' (2019), 23 Journal of Lesbian Studies 3, 383-396.

not carried out a queer re-construction of this notion, but it has acknowledged that the meaning of sex can be re-shaped [...] acknowledging its authority to construct and re-construct this legal concept,” though consistently relying on medical interpretation of the notion of sex.<sup>124</sup> When the Court recognises transsexuality-related rights, it does so by reinforcing heteronormative and gender binary paradigms.

Grigolo, while also reporting the evolving attitude of the Council of Europe system, notices its difficulty of abandoning a notion of privacy focusing on sex. Indeed, the Court identified two basic sexual rights: “the right to choose sexual activity and sexual identity and the right to establish relationships and family life in accordance with this choice.”<sup>125</sup> While the former pertains to the private sphere of the subject and was overall achieved by re-elaborating the concept of private life in relation to sexual life, the Strasbourg judges struggle to ensure the same degree of recognition and protection when sexual rights emerge into the public sphere, as well exemplified by the lack of recognition of same-sex marriage under the Convention. In this perspective, Grigolo finds that the Court keeps coming back to heteronormative essentialist assumptions, also because of national States’ resistance to legal and social change.<sup>126</sup>

This affects the ECtHR interpretative techniques, where the Court has shown a tendency to rely on State parties’ consensus regarding controversial issues of gender and sexuality, favouring a fixed interpretation of sexuality, and medicalised views of gender diversity.<sup>127</sup> The necessity to find a common ground among member States emerges in relation to gender and sexuality in public settings: although progress has been made in the area of freedom of expression and association, European regional institutions have addressed issues concerning the LGBTQ prison minority without taking a stance against the homophobic and transphobic roots of prison as a system.<sup>128</sup>

New perspectives regarding the legal definition of gender and sexuality have been explored. Waaldijk adopts an innovative approach to sexual orientation law issues by proposing to introduce the “right to relate” as a link between the notion of “orientation” and “the basic psychological need for love, affection, and belongingness.” He argues that “this right can be seen as the common theme in all issues of sexual orientation law (ranging from decriminalization and anti-discrimination to the recognition of refugees and of same-sex parenting).”<sup>129</sup> According to Waaldijk, sex, sexual activity and gender do not exhaustively explain why sexual orientation should be recognised and protected, while sexuality, intended as sexual activity, can assume too many meanings for different people to not be confusing. On the other hand, the right to relate as “the right to establish and develop relationships” is more versatile and can be implicitly traced in both national and international

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<sup>124</sup> Gonzales-Salzberg, n.78.

<sup>125</sup> Grigolo, n.105. On the development of sexual orientation and gender identity-related protection at the European Court of Human Rights, see also Danisi 2015; Paul Johnson, n.117; Gonzales-Salzberg, n.119; Pieter Cannoot, ‘The pathologisation of trans persons in the ECHR case law on legal gender recognition’ (2019), 37 *Netherlands Quarterly of Human Rights* 1.

<sup>126</sup> Grigolo, n.105. Johnson, n.117.

<sup>127</sup> Cannoot, n.125.

<sup>128</sup> See e.g. Paul Johnson and Silvia Falchetta, ‘Sexual Orientation Discrimination and Article 3 of the European Convention of Human Rights: developing the protection of sexual minorities’ (2018), *European Law Review*, at 168.

<sup>129</sup> Kees Waaldijk, ‘The Right to Relate: A Lecture on the Importance of “Orientation” in Comparative Sexual Orientation Law’ (2013), 24 *Duke Journal of Comparative & International Law* 1, 161-199.

decisions,<sup>130</sup> also having the advantage of encompassing “the right to come out” (i.e. to establish a relationship based on attraction) and “the right to come together” (i.e. to maintain and nurture a relationship, not necessarily of homosexual nature).<sup>131</sup> This concept recalls the efforts of international experts to introduce a more encompassing definition of sexual orientation (e.g with the Yogyakarta Principles), and is useful to highlight a more “romantic” and less sexualised vision of same-sex intimacy.<sup>132</sup>

However, the confusion Waaldijk attaches to the notion of sexuality may be exactly that element of truthfulness that queer theory seeks to preserve in the human rights search for a universal version of the human.<sup>133</sup> Furthermore, a debate on definitional choices and their implications shall necessarily consider intersectionality in the analysis of gender and sexuality, and their relation with other characteristics, such as race or class, if it intends to allow avoidance of stereotypical assumptions and opening to new perspectives, for instance allowing a reflection of gender identity that considers its links to sexuality.<sup>134</sup>

Additionally, the degree of relevance and meaning attached to sexuality and gender identity vary according to the area of law under consideration:<sup>135</sup> current prison legislation in the US and Europe tend to focus on expectancy of good behaviour from prisoners, even and especially after release, but it does not properly address the risks of imprisonment for certain vulnerable groups among the prison population,<sup>136</sup> including sexual minorities, transgender and gender non-conforming people.

This depends also on the fact that same-sex sexuality, although considered in the human rights forum as “an essential part of the human,”<sup>137</sup> maintains its roots in the notion of privacy as a protection against disgust rather than being associated with the principle of human dignity that rehabilitation programmes are supposed to

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<sup>130</sup> Id, 183-185.

<sup>131</sup> Waaldijk, *ibid*, at 189. Graupner prefers instead to use the term “sexual rights” to avoid limiting its application to Western-based society models, in the aim of analysing the work of international bodies, particularly within the European region, concerning the sexual life of individuals. He links sexual rights with the concept of dignity, and with the right to sexual self-determination, which presents two sides: “the right to engage in wanted sexuality and the right to be free and protected from unwanted sexuality, sexual abuse and sexual violence” (Graupner, n.118, at 110-111).

<sup>132</sup> Waaldijk has also observed that international law, and the jurisprudence of the ECtHR, have incrementally recognised the rights of LGBT people, and of same-sex partners in particular. The Strasbourg judges have adopted a more inclusive language with time, confirming the growing tendency to link same-sex relationships with the right to family life. Interestingly, such progressive interpretation, which did not always translate into favourable judgments for same-sex applicants, was made possible via a process of assimilation of homosexual partnerships with a notion of family that relates to “stable and committed relationships.” See Kees Waaldijk, ‘Great diversity and some equality: non-marital legal family formats for same-sex couples in Europe’ (2014), 1 *GenIUS* 2, 42-56.

<sup>133</sup> See for example queer criminologists’ challenges towards laws and policies that marginalise queer minorities by attributing negative connotations to expressions of desire manifested also through sexual desire, or making them invisible because they are “deviant”: Charlotte Knight and Kath Wilson, *Lesbian, Gay, Bisexual and Trans People (LGBT) and the Criminal Justice System* (Palgrave Macmillan Limited 2016); Raj, n.31; Ball, n.48; Dalton, n.11; ); Peter Dunn, ‘Slipping off the equalities agenda? Work with LGBT prisoners’ (2013), 206 *Prison Service Journal*, 3-10.

<sup>134</sup> See Richardson and Monro, n.32, at 40-45.

<sup>135</sup> Reed Hon. Lord Robert, ‘Transsexuals and European Human Rights Law’ (2005), 48 *Journal of Homosexuality* 3-4, 49-90.

<sup>136</sup> Ian O’Donnell, ‘The aims of imprisonment’, in Yvonne Jewkes, Jamie Bennett, Ben Crewe eds., *Handbook on Prisons* (II edition, Routledge, London 2016), 39-54 40-42.

<sup>137</sup> Mindy Jane Roseman & Alice M Miller, ‘Normalizing Sex and its Discontents: Establishing Sexual Rights in International Law’ (2011), 34 *Harvard Journal of Law and Gender*, 315; Correa and others, n.112; Weeks, n.15.

restore. A similar refusal to accept diversity causes the reiteration of dominant interpretations framed within a privileged and binary model of gender.

The notion of privacy and non-discrimination that grounds the legal defence of SOGI rights has been left unquestioned, informing the legal process of categorisation used to shape LGBT rights as a concept.<sup>138</sup>

Queer researchers have highlighted the importance of such processes to signal the absence of these individuals in “previous versions of the human”<sup>139</sup> but they have also exposed the attempts to normalise LGBT rights to engage uncritically with certain aims and policies.<sup>140</sup>

Particularly, it has been noticed that the LGBT acronym does not represent all the identities and nuances underpinning the notion of gender and sexuality,<sup>141</sup> that is why the emergence of new terms such as sexual orientation and gender identity needs to be properly investigated in legal and sociological theory, in order to prevent their perpetual re-framing into fixed categories.<sup>142</sup>

For instance, queer thinkers observe that advocacy and scholarly movements have used the terms “LGBT rights” and its declinations to advance the legal status of sexual minorities and expand the protection offered by international law,<sup>143</sup> but in so doing they have overlooked non-Western constructions of sexual and gender identities and decided to focus on more “acceptable” issues to the heterosexual majority, such as same-sex marriage and hate crime legislation. Consequently, LGBTQ people who are non-white, incarcerated, facing economic difficulties, or marginalised to various extents, were neglected;<sup>144</sup> it is also contended that bodily diversity is overlooked by international human rights mechanisms unless it can be linked with SOGI.

The unresolved conflict between public and private dimension of human rights, gender and sexuality means that States can hardly be made accountable for discriminatory or violent actions associated with the private sphere, even if they can be linked with systemic phenomena.<sup>145</sup> It also facilitates the risk that the discourse on sexuality proceeds along essentialist lines.<sup>146</sup> That is why LGBTQ prisoners’ rights should be protected by strengthening the efforts to invoke the right not to be treated in a cruel, inhuman and degrading manner, and

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<sup>138</sup> Correa and others, n.112; Julie A Greenberg, ‘The Roads Less Travelled: The Problem with Binary Sex Categories’, in Paisley Currah P, Richard M Juang & Shannon P Minter (eds.) *Transgender Rights* (London: University of Minnesota Press 2006).

<sup>139</sup> Butler, n.78.

<sup>140</sup> Duggan, n.100; Gross, n.100.

<sup>141</sup> Cai Wilkinson and Anthony Langlois, ‘Special Issue: Not Such an International Human Rights Norm? Local Resistance to Lesbian, Gay, Bisexual, and Transgender Rights—Preliminary Comments’ (2014), 13 *Journal of Human Rights* 3.

<sup>142</sup> Waites, n.112; Danisi, n.115; Grigolo, n.105.

<sup>143</sup> Wintemute, n.119; Robert Wintemute and Mads Andenas, *Legal recognition of same-sex partnerships: a study of national, European and international law* (Oxford: Hart 2001).

<sup>144</sup> Ignacio Saiz, ‘Bracketing Sexuality: Human Rights and Sexual Orientation – A Decade of Development and Denial at the UN’, Sexuality Policy Watch Working Papers N.2, November 2005; Waites, n.112.

<sup>145</sup> Parisi, n.107, 579-580.

<sup>146</sup> O’Brien, n.115.

the principle of equality and non-discrimination, besides the right to privacy.<sup>147</sup>

## 2.7 The internalisation of human rights norms concerning gender and sexuality

The mechanisms of emergence of international norms on gender and sexuality deserve to be thoroughly analysed to understand the modality and effects of their internalisation, and how they are integrated in national legislation and policies of imprisonment.

Finnemore and Sikkink's international norms dynamics approach is revealing: according to their theory, norms follow a life cycle from emergence to cascade to internalisation. In the norm emergence stage, international stakeholders aim to convince a sufficient number of States to accept a norm and "become norm leaders"; a norm cascade takes place when a considerable number of States adopt the new norm and decide to comply with it; finally, with norm internalisation, this is accepted by the international community and it is no longer the object of public debate, thus becoming nationally institutionalised through consistent behaviour.<sup>148</sup>

Finnemore and Sikkink argue that the simpler the norm, the easier for it to emerge, be accepted, and internalised by domestic actors. This is problematic, as for gender (identities) or sexualities the "universal" presents a complexity that risks getting lost in the consolidation of a "universal" norm that can be globally enforced.<sup>149</sup> In this sense, the societal dimension plays a crucial role: Kollman observes that in well-developed countries the instrumental procedures of internalisation are perhaps less relevant than social acceptance of the formally integrated norm.<sup>150</sup>

Elisabeth Baisley's status-differentiated rights approach could represent the solution to acknowledge the plural and intersectional dimension of gender and sexuality. Going beyond the international law debate between universal or special international human rights, Baisley argues that rights can be exercised both by a whole group, such as sexual minorities, or by individual members of that group. Depending on the moment, they can be considered as "special", were it to be at the concept level, or at the interpretation or implementation stage.<sup>151</sup>

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<sup>147</sup> Graupner highlights that sexual rights have been protected by international institutions by referring to the right to privacy, the right not to be treated in a cruel, inhuman and degrading manner, and the principle of equality and non-discrimination, among others (Graupner, n.118, at 110).

<sup>148</sup> See Elisabeth Baisley, n.112. See also Martha Finnemore & Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998), 52 *International Organisations at Fifty: Exploration and Contestation in the Study of World Politics* 887, 895.

<sup>149</sup> Baisley, *ibid.*

<sup>150</sup> Kelly Kollman, 'Same-Sex Unions: The Globalization of an Idea' (2007), 51 *International Studies Quarterly* 2, 329-357.

<sup>151</sup> Baisley elaborates on upon Kymlicka's theory on group-differentiated rights, which stresses that certain minorities are in need of rights that cannot be subsumed into general human rights, thus recalling the "special" conception of human rights for certain categories (Elisabeth Baisley 'Status – Differentiated Rights' (2012), 11 *Journal of Human Rights*, at 367-369). She also analysed and somehow contested Felice and Jones' notion of the group rights category, which pertains to individuals with specific characteristics, such as sexuality (William F Felice, *Taking Suffering Seriously: The Importance of Collective Human Rights* (Albany, NY: State of New York Press 1996)); It descends that if collective rights are exercised jointly by individuals, group rights can be claimed only by the group as such (Jack Donnelly, *Universal Human Rights in Theory and Practice* (2<sup>nd</sup> ed., Ithaca, NY, Cornell University Press 2003).

Baisley agrees with Donnelly that human rights are universal only at the level of substance, whereas they become diversified at the subsequent stage of interpretation or implementation. She suggests that the Yogyakarta Principles<sup>152</sup> are a good example of this, but also a representation of the status-differentiated rights theory. They do not introduce “new” rights for sexual or gender diverse people, but establish progressive interpretations of existing human rights: “Rather than expanding international human rights law, the Yogyakarta Principles seek to “clarify State obligations under existing international human rights law”.”<sup>153</sup> Even principles specifically directed to a certain minority, such as the ones concerning gender reassignment and gender identity, draw from existing human rights standards, hence remaining universal in terms of conceptualisation.

She deems this approach really effective to overcome the distinction between equal rights and special rights by both maintaining a universalistic consideration of human rights and recognising the importance of acknowledging difference when necessary. I am not convinced by this latest conclusion, as I agree with queer and post-feminist theorists that the Principles, although a welcome addition to the international human rights framework, are not fully inclusive, but continue adopting paradigms that favour “respectable” expressions of sexual and gender diversity.<sup>154</sup>

In my opinion, Baisley’s reasoning is stronger when she recognises the necessity of adapting certain categorisations to specific cases and scenarios. She reminded me of Ken Plummer citing Ruth Lister’s ‘differentiated universalism’ to suggest that the concept of universal human rights - including gender and sexuality - can reflect the pluralism of values only if it acknowledges the tension between cosmopolitan claims and the local specificities of diverse cultures, finding links between the local and wider contexts: hence, “queering” the universal.<sup>155</sup>

Internalisation proves to be even more complex in the context of imprisonment. The human rights approach is based on the premise that deprivation of liberty constitutes a punishment per se, but even if prisoners’ human rights should be maintained and protected, certain limitations can be considered legitimate for security

reasons.<sup>156</sup> Therefore, fundamental human rights shall be maintained inside prison. Specifically, the prison

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<sup>152</sup> In 2006 a group of international human rights experts met in Yogyakarta, Indonesia, “to outline a set of international principles relating to sexual orientation and gender identity. The result was the Yogyakarta Principles: a universal guide to human rights which affirm binding international legal standards with which all States must comply.” See International Commission of Jurists. “Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity” (2007), at [<http://www.yogyakartaprinciples.org/>], accessed 14 September 2017. (Yogyakarta Principles).

<sup>153</sup> Baisley, n.151, at 374.

<sup>154</sup> On the other hand, the reviewed version of the Principles, along with the work of the recently appointed Independent Expert on sexual orientation and gender identity, contributed to shedding light on the intersectional concerns attached to the notion of gender and sexuality within the human rights framework. At the same time, critiques of the Yogyakarta Principles labelling this initiative as an attempt to realise “special rights for gay and lesbians” (Brewer 2003) or to introduce inappropriate practice in the legal discourse miss the point of what the Yogyakarta Principles are, also in light of Donnelly’s theory of three levels of theorisation and enforcement of human rights. For further analysis, see Chapter 4.

<sup>155</sup> Plummer, n.23.

<sup>156</sup> Kempen, P.H.P.H.M.C., van, ‘Positive Obligations to Ensure the Human Rights of Prisoners. Safety, Healthcare, Conjugal Visits and the Possibility of Founding a Family under the ICCPR, the ECHR, the ACHR and the AfChHPR’,

system shall be informed on the principle of respect of human dignity.<sup>157</sup> Prisoners should enjoy the same rights as persons outside, “subject to the restrictions that are unavoidable in a closed environment”.<sup>158</sup> Despite the fact that human rights institutions have generally recognised that sexuality is part of the physical and moral integrity of the person, and that they have condemned forms of segregation of sexual minorities in prison amounting to solitary confinement,<sup>159</sup> or the treatment suffered by homosexual, lesbian and transgender prisoners,<sup>160</sup> they maintain a cautious approach to sexuality, notwithstanding the tendency to take the traditional heterosexual family as the norm. The risk is that everything non-heterosexual is considered the same, without differentiating among diverse experiences.

Once more, the social context and level of acceptance of SOGI acquires great importance when assessing the impact of human rights internalisation. Tahmindjis stipulates that there is a symbiosis between international and national mechanisms, that can arise in different modalities: it is explicit when expressions like “according to law” or “prescribed by law” are used, but implicit when words such as “family” and “marriage” are adopted, which have a generalised meaning, but can assume different legal meanings according to the context, as the example of same-sex marriage litigation demonstrates.<sup>161</sup> Similarly, the concept of public order and security in prison law may vary depending on penitentiary prison policies of a certain country,<sup>162</sup> or even of a certain penal institution. Furthermore, within the prison framework the concept of functional symbiosis acquires great relevance, as it addresses the manner with which a certain right is introduced within national legislation.

Indeed, the multi-layered legal and administrative framework of prisons, along with the autonomous powers attributed to prison Governors in implementing penal policies, makes the application of human rights more

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in Prison Policy and Prisoners' Rights. The Protection of Prisoners' Fundamental Rights in International and Domestic law (Nijmegen: Wolf Legal Publishers 2008).

<sup>157</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Art. 10.

<sup>158</sup> UN Human Rights Committee (HRC), General Comment 21, Article 10, U.N. Doc. HRI/GEN/1/Rev.1 at 33 (1994), 10 April 1992, par. 3. More specifically, it is widely accepted as a general principle that deprivation of liberty constitutes a punishment per se, whereas any additional limitations of prisoners' rights is contrary to international human rights law, unless it does comply with the legality, necessity and proportionality test (Susan Easton, ‘Protecting Prisoners: The Impact of International Human Rights Law on the Treatment of Prisoners in the United Kingdom’ (2013), 93 *The Prison Journal* 4, 475–492; van Kempen, n.156). Even according to the retributive theory of punishment, the sentence must be proportionate to the seriousness of the offence and the responsibility of the offender, but at the level of implementation, the retributive scope of sentencing is accomplished by the deprivation of liberty in itself. See Dirk Van Zyl Smit and Sonja Snacken, *Principles of European prison law and policy: penology and human rights* (Oxford University Press 2009).

<sup>159</sup> See e.g. *X v Turkey*, Application No 24626/09, (ECtHR, 9 October 2012).

<sup>160</sup> See e.g. Committee against Torture, UN Doc. A/56/44, 12 October 2001; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (SRT), A/HRC/31/57, 5 January 2016.

<sup>161</sup> Graupner, n.118; Waaldijk, n.123; Johnson, n.117; Philipp Tahmindjis, ‘Sexuality and International Human Rights Law’ (2005), 48 *Journal of Homosexuality* 3–4, 9–29.

<sup>162</sup> The debate concerning the underlying aim of prison management, were it should be bureaucracy or more human rights-oriented, connects with the more general discussion on the scope of imprisonment. As pointed out by Van Zyl Smit, the analysis of prison regulation should not overlook the substance of these norms, particularly considering their multi-layered nature, since they may be included in legal as well as administrative provisions, with different effects. Dirk Van Zyl Smit, ‘Legitimacy and the Development of International Standards for Punishment’, in: Justice Tankebe and Alison Liebling, eds., *Legitimacy and Criminal Justice: an International Exploration* (Oxford University Press Oxford University Press 2013), 267–292.



fragmented and more sensitive to the social context where the penal estate operates.<sup>163</sup> For instance, Genders and Player, and Lazarus observe that the UK prison framework has emphasised managerial concerns over human rights principles integrated into domestic legislation, thus seriously affecting the effective application of the latter in the organisation of prison life.<sup>164</sup>

## 2.8 The clash between respect of inmates' human rights and the prison normative paradigm

The problem with applying international human rights norms in the context of imprisonment is therefore connected not only with an uncritical embrace of the concept of the “universal” sexual and gender diverse subject, but also with the techniques with which the State exercises power in prison.

The specific dynamics of power that develop within prison depend on it being a “total institution,” as theorised by Erving Goffman. A total institution has “encompassing character.” Its total character “is symbolised by the barrier to social intercourse with the outside and to departure that is often built right into the physical plant, such as locked doors, high walls, barbed wire, cliffs, water, forests or more”.<sup>165</sup> Prisoners lead all aspects of their life, even the most basic ones, such as eating or sleeping, in the same place and under the same authority. Their existence is governed by bureaucratic rules designed to achieve given objectives. Differently from other total institutions such as hospitals or elderly homes, prisons are not designed for the advantage of their hosts, but to keep society safe from them. Thus, although diverse aims of imprisonment have been identified, in Goffman's model the primary scope of prison remains custody and punishment.<sup>166</sup>

In contrast, all main international human rights sources after the Second World War focus on rehabilitation as a fundamental scope of imprisonment.<sup>167</sup>

The concept of rehabilitation has been widely explored by criminological literature; among the various definitions of rehabilitation, a minimalist approach identifies it as the attempt to “reconstitute the prisoner's spatiotemporal world without avoidable collateral damage.”<sup>168</sup>

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<sup>163</sup> Tahmindjis underlines the social context cannot be disregarded when it comes to recognition of sexual orientation and gender identity. On the relationship between social context and prison, see also Alison Liebling, ‘High Security Prisons in England and Wales: Principles and Practice’, in Yvonne Jewkes, Jamie Bennett., Ben Crewe eds., *Handbook on Prisons* (II edition, Routledge, London 2016), 477-496; Van Zyl Smit, n.162.

<sup>164</sup> Liora Lazarus, ‘Conceptions of Liberty Deprivation’ (2006), 69 *The Modern Law Review* 5, 738-769; Elaine Genders and Elaine Player, ‘Rehabilitation, risk management and prisoners' rights’ (2014), 14 *Criminology & Criminal Justice* 4, 434-457.

<sup>165</sup> Erving Goffman, *Asylums: essays on the social situation of mental patients and other inmates* (New York: Doubleday 1961), 4.

<sup>166</sup> Criminological theory commonly groups the aim of imprisonment in four categories: retribution, incapacitation, deterrence, and rehabilitation. Goffman's argument seems to refer to the first three categories. Retribution corresponds to the idea of deprivation of liberty as a proportionate punishment for the committed crime, while incapacitation relies on removing criminals from society, so that they cannot do harm anymore. The notion of deterrence focuses on the use of imprisonment as a warning to people who are thinking of committing a future crime (O'Donnell, n.136, at 39).

<sup>167</sup> See e.g. ICCPR, n.157, Art. 10.

<sup>168</sup> O'Donnell, n.136, at 39.

Forsyth distinguishes between rehabilitation and reform, where the former aims at re-establishing the individual's reputation and status as a citizen, while the latter is rooted in the idea of changing the individual's moral values and behaviour.<sup>169</sup> Von Hirsch and Ashworth's definition appears closer to rehabilitation, as they believe it should be identified as the cure "for an offender of his or her criminal activities, changing an offender's personality [...] so as to make him or her less inclined to commit crimes."<sup>170</sup>

Some rehabilitative programs are referred to as "Risk model," in the sense that they pinpoint what behaviours represent a risk for the community and set an agenda to eradicate them. This model tends to overlook the individual needs of prisoners, and it often does not take into due consideration the social and cultural context the prisoner comes from.

Conceptualisations such as Von Hirsch and Ashworth's were considered too invasive, and later substituted with the notion of "social (re)integration," defined as "the opportunity to participate in all aspects of social life which are necessary to enable persons to lead a life in accordance with human dignity".<sup>171</sup> The latter appears wider in scope than the narrower objective of limiting damages that a prisoner could cause after release. These theories have also been labelled as "Good Lives Model," which aims at treating the prisoner as a subject rather than an object, and to consider how the prisoner can contribute to their family and society overall. This seems in line with Rotman's proposal to engage with a humanistic rehabilitation, which does not try to change individuals by promoting "subtly imposed paradigms," but gives prisoners the chance to change their lives through dialogues encouraging self-awareness and possibly a new perspective on the self.<sup>172</sup>

However, the literature sees the creation of conditions for the humane treatment of inmates as a difficult task, mainly by reason of the complexity of ensuring humanity in a context where prison policies are more and more concerned with security issues. This phenomenon translates into more restrictive environments, where basic services and functions associated with the basic well-being of prisoners are included in the concept of treatment, while deprivation of essential goods and services becomes a component of the "behaviour modification" programme.<sup>173</sup> In particular, queer criminologists criticise the tendency of fellow criminologists and professionals operating in the CJS to focus on quantitative data and statistics while overlooking the elaboration of an individualised treatment that also considers the story and needs of each inmate, especially if at risk of marginalisation.<sup>174</sup>

Once more, the conflict between managerial practices and human rights application becomes visible: Liebling points out the sophistication of contemporary government policies, which could make possible the consolidation of a system based on "micro-regulation of individual prisons," thus facilitating the regulation of

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<sup>169</sup>See Philip Priestley, Maurice Vanstone, *Offenders or Citizens?: Readings in Rehabilitation* (Willan, 2010), 1-4.

<sup>170</sup> Van Zyl and Snacken, n.158, at 83.

<sup>171</sup> Ibid, at 83.

<sup>172</sup> Tony Ward and Shadd Maruna, *Rehabilitation* (Taylor and Francis, 2007); Priestley and Vandstone 2010.

<sup>173</sup> Ernest L Cowles, 'Creating the Elements of a Humane Prison System', in Jones D (ed.), *Humane Prison* (Oxford, Seattle: Radcliffe Publishing, 2006), at 101-113.

<sup>174</sup> Dalton, n.11; Ball, n.48.

prison management.<sup>175</sup> Contextually, this scenario could favour a bureaucratic approach to the establishment and guarantee of prison standards, yet with the risk of compromising the protection of prisoners' conditions and human rights.<sup>176</sup>

The rehabilitative scope of prison is often connected with the concept of "normalisation" of inmates, i.e. with the objective of ensuring that prisoners can function normally in society after confinement. Educational programmes organised by penal institutions aim to respond to this conceptualisation of the prison experience.<sup>177</sup> Most importantly, by "normalising" prisoners, public authorities progressively abandoned the principle of less eligibility, which implied that the prison population should be exposed to worse conditions than the general public outside; in this sense, human rights law had an important role in reducing the impact of such principle.<sup>178</sup>

Nevertheless, models of rehabilitation that see inmates as passive recipients of treatment, or more humane models which however tend to normalise prisoners in light of paradigms produced by the State power, recall the Foucauldian institutional theory of imprisonment. In *Discipline and Punish: The Birth of the Prison*, Foucault asserts that the medicalisation of notions related to sexuality, which led to the identification and regulation of "sexual perversions," facilitated the reform of detention as a type of punishment aimed at confining individuals that, for different reasons, could not be integrated in society, due to their "deviant nature."<sup>179</sup>

Accordingly, prison establishes mechanisms of controls of the body imposing a relation of "docility-utility" which can be called "disciplines." The punishment put discipline in motion, creating an "artificial order," exposed by the law and a set of regulations and programmes; and an order defined by "natural and observable processes."<sup>180</sup> The corrective force of punishment is enacted through surveillance and strategies of normalisation, which aim to promote mechanisms of "homogenisation" of identities, in fact creating a formal equality.

The disciplinary power requires a compulsory visibility, yet at the same time acts invisibly. The constant monitoring has to happen by separating inmates, so to account for their knowledge and manage it, but happen unseen. Foucault argues that the theory of panopticism elaborated by Jeremy Bentham well exemplifies this practice of discipline through segregation.

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<sup>175</sup> Liebling, n.175.

<sup>176</sup> Bennet adds to this that current progress in technology could indeed favour indifference towards prisoners' needs, which could provoke a lack of attention to human rights violations against the prison population, especially in environments like the penal estate, that remain largely hidden to the general public. Such potential absence of control upon the prison staff makes it more important to enhance mechanisms which can ensure that the public authority acts responsibly. See Peter Bennett, 'Prisons and Human Rights,' in Yvonne Jewkes, Jamie Bennett, Ben Crewe eds., *Handbook on Prisons* (II edition, Routledge, London 2016), 324 – 339; Thérèse Murphy and Noel Whitty, 'Risk and Human Rights in UK Prison Governance' (2007), 47 *British Journal of Criminology* 5, 798-816.

<sup>177</sup> Van Zyl Smit and Snacken, n.158; Easton, n.158.

<sup>178</sup> Easton, n.158.

<sup>179</sup> Foucault, n.5.

<sup>180</sup> Foucault, n.5, at 179.

Therefore, the prison environment was altered into a place of “deprivation of liberty,” tailored to punish the author of crime for having contravened the social pact as regulated by the law; and by using it as a site of change and correction.<sup>181</sup>

Foucault’s theory on authority, power, discipline and knowledge within the prison experience managed to connect the inequalities entrenched in society and the similarly unequal distribution of criminal responsibility. Hence, prisoners are both the object of confinement and regulatory practices and the subjects re-creating them after having internalised their personal responsibility.<sup>182</sup>

Some notice that this institutional model does not exist in contemporary prison organisation. American literature in particular observes that the prison administration does not act in terms of constant monitoring of prisoners’ activity, on the contrary it relies on absent or poor control. In addition, the panopticon structure has been criticised as almost never being applied in reality.<sup>183</sup> Inmates can create temporary arrangements to gain some privacy (e.g. by covering the cell walls) and officers are more concerned with controlling entrances and exits than in checking on prisoners. Little interest would be dedicated to the history and identity of each single inmate.<sup>184</sup>

On the other hand, this opinion is not shared by all experts, who do not believe Foucault’s vision to be based on utopian thoughts only, or that the panopticon model is outdated or forgotten. Ristroph reports the tendency to ask for more surveillance and more separation among confined subjects within prisons, in order to deal with the problem of increased rates of rape and sexual violence: “build more, and better, panopticons.”<sup>185</sup> She appears to interpret the concept of panopticon less literally, while referring to the scope underpinning its conceptualisation. Besides, the Foucauldian model can arise in different modalities according to each institution, since every prison is different, and sometimes only to certain elements of it. Van Zyl Smit and Snacken also notice that modern societies are dealing with different degrees of freedom within the penological system – even inside the same penal estate – depending on the prisoner’s sentence and on the progress of their rehabilitative process.<sup>186</sup>

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<sup>181</sup> Joey Mogul, Andrea Ritchie, Kay Whitlock, *Queer (In)Justice. The Criminalization of LGBT People in the United States* (Beacon Press, Boston 2011).

<sup>182</sup> Jennifer A. Schlosser, ‘Bourdieu and Foucault: A Conceptual Integration Toward an Empirical Sociology of Prisons’ (2013), 21 *Critical Criminology* 1, at 43-44.

<sup>183</sup> C. Fred Alford ‘What would it matter if everything Foucault said about prison were wrong? ‘Discipline and Punish’ after twenty years’ (2000), 29 *Theory and Society* 1, 125–146, 125-127.

<sup>184</sup> Alford, *ibid*, 132-134.

<sup>185</sup> Alice Ristroph, *Sexual Punishments* (2006), 15 *Columbia Journal of Gender and Law* 1, 139-184, at 176.

<sup>186</sup> Another theoretical school has developed the material model. Explored by Rushe and Kirchheimer, the material model links the individual and general deterrence function of imprisonment with the material sphere of society. They argue that the more the social environment faces an economic crisis, the more prison conditions deteriorate, since imprisonment must always be enacted to be worse than the life outside. According to this model, prisoners’ bodies are sites of production and become relevant to increase the labour force within society. According to Ruggiero, contemporary prisons tend to synthesise the material and institutional function, though the latter is still prevailing while undergoing technical modifications apt to the “metaphorical annihilation of those prisoners who are deemed impervious to treatment”. See Vincenzo Ruggiero, ‘Carceral social zones’ (2012), 89 *Criminal Justice Matters* 1, 20-21; Vincenzo Ruggiero, *Italy*, in Robert Weiss and Nigel South, *Comparing prison systems: toward a comparative and international penology* (Amsterdam : Gordon & Breach 1998).

The data analysis is aligned to these latter arguments. Certainly, the prison organisational paradigm imposes specific limits and mechanisms of surveillance over sexuality and identity, for instance by locating transgender prisoners in estates which correspond to their biological sex rather than their preferred gender, thus replicating a naturalised notion of gender.

A queer phenomenological approach also acknowledges that the space and its organisation has consequences in terms of one's sense of the self and (sexual) orientation. Settling into a new environment can be a disorienting experience for the body, which needs to adapt to a new reality.<sup>187</sup> Sometimes, this process can be painful, as it implies a loss of certainty, and the individual may react by adopting defensive strategies, which in political terms translate into a conservative approach. Disorientation and loss of control may even lead to using violence in order to acquire a new balance through a position of dominance upon the other subjects.<sup>188</sup> I would add that by disciplining and fixing the possible orientations that a body can take in relation to other bodies and objects, this sense of disorientation will most likely increase.

## 2.9 The pains of imprisonment and the deprivation of heterosexual relations

The disciplinary practices enhanced by the State influence the type of relationships emerging in a context of deprivation of liberty. The literature on prison has always engaged with this phenomenon, but the lives of queer individuals have generally been overlooked, while the investigation of the dynamics between institutional power and limits to expressions of sexualities and identities has been affected by the characterisation of the queer subject as deviant.

The review of the literature on prison sexuality shows that most of the contributions referring to this issue can be broadly categorised in the following groups: discussions on the phenomenon of “situational homosexuality”, and “sexual deviances” more generally, often described from a medical perspective; analysis of prison hierarchies based on sexual paradigms, also reflected in unique features of prison jargon; reports of sexual acts ending up in violence or rape; commentaries on visitation programmes, and their impact on family relationships. More recently, a number of authors, mainly commenting the American prison system, but also analysing English and Italian prisons, have focused on the treatment of transgender inmates.

Early work on imprisonment identified sexual deprivation as one of the pains of imprisonment. Notably, Sykes introduced this concept to highlight the psychological suffering linked with confinement, focusing on the loss

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<sup>187</sup> Ahmed, n.29, at 157 – 179.

<sup>188</sup> Ibid., at 160. Dalton criticises Ahmed's queer phenomenology by stating that it remains too abstract and inapplicable to the CJS in practice. I do not share this view, as I believe that my participants' accounts represent a vivid example of the translation of Ahmed's words in a true-life scenario. For Dalton's critique of Ahmed, see Dalton, n.11.

of liberty, desirable goods and services, heterosexual relationships, autonomy, and security.<sup>189</sup> According to Sykes, the accumulation of these deprivations explains why inmates found prison life unbearable.

Sykes' idea is that the inner features of imprisonment do not contribute to crime deterrence, as such imposed suffering on inmates leads them to create a communal antipathy towards correctional officers, and facilitates the creation of an inmate culture.

Particularly, he argues that the loss of heterosexual relations has profound negative consequences on inmates, among which is the establishment of "latent homosexual tendencies". He also described the rise on male-on-male sexual assaults as an outlet for homosexuality. Goffman notices that the denial of heterosexual opportunities "can induce fear of losing one's masculinity."<sup>190</sup>

Sykes' theories have been challenged in later years. For instance, Crewe has reviewed the pains of imprisonment in relation to more recent penal policies, particularly those applied in England. He stipulates that a newer form of harm for inmates is represented by the indeterminacy of current sentencing and administrative policies, which negatively affect prisoners' levels of stress and expectations. Lack of certainty regarding the scope of their rehabilitation process and the impossibility for them to make plans, increase their pain and concern about the future.<sup>191</sup> Crewe describes this sensation as tightness, i.e. a feeling of uncertainty that works at the psychological level and generates anxiety.

The assessment of respect of humanity in prison is balanced against the "vertical" oppressiveness of imprisonment originated by prison authorities' exercise of power. Liora Lazarus examined the English prison system and identified this tension between conflicting goals as the difficulty of State power to make it clear what the scope of imprisonment is within a legal system, rather favouring bureaucratic practices that tend to increase prisoners' disorientation, and ultimately fail to protect their fundamental human rights.<sup>192</sup>

This framework affects LGBTQ prisoners by prioritising predetermined categorisations of sexualities and identities that lack flexibility and nuance.<sup>193</sup>

Regarding Sykes' conceptualisation of heterosexual relations and homosexuality, nowadays his arguments appear reductive. Feminist criminologists have criticised their gendered nature, as they concerned only male inmates, whereas women were labelled as asexual.<sup>194</sup> Thanks to gay and lesbian liberation movements and theories, the struggle of marginalised categories, including LGBTQ prisoners is now considered an example of the necessity of people differing from the heterosexual norm to be recognised, and fight against a system

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<sup>189</sup> Gresham Sykes, *The Society of Captives: A Study of a Maximum Security Prison* (Princeton, NJ: Princeton University Press 1958). Ben Crewe, 'Depth, weight, tightness: Revisiting the pains of imprisonment' (2011), 13 *Punishment & Society* 5, 509-529.

<sup>190</sup> Goffman, n.165, at 23.

<sup>191</sup> Crewe, n.189, at 513.

<sup>192</sup> Lazarus, n.164.

<sup>193</sup> Crewe, n.189, at 515 and following.

<sup>194</sup> Kunzel argues this was a reflection of American moralism. See Regina Kunzel, *Criminal Intimacy: Prison and the Uneven History of Modern American Sexuality* (University of Chicago Press 2008), 100 and following.

aimed at normalising identities along lines of social acceptance.<sup>195</sup> Both contributed to acknowledge the extreme version of the patriarchal, heteronormative conceptualisation of inmates' social relationships.

Still, criminological literature has continued describing same-sex sexuality in prison as a form of necessity due to the deprivation of heterosexual contacts. Some label it as "situational" homosexuality and explain it in relation to sexual segregation. This behavioural framework would translate into heterosexual people starting to identify as bisexual during imprisonment, or according to other studies, into prisoners continuing self-identifying as straight while practising same-sex sexual conduct.<sup>196</sup>

Others underline that prison overcrowding constitutes a core factor that favours the development of same-sex sexual contacts (similarly, overcrowding is considered a crucial condition for the high rate of episodes of sexual coercion inside prisons). Ibrahim stipulates that facilities overcrowding prevents prisoners from enjoying privacy, and makes it easy for same-sex relationships to happen. Furthermore, he sees the lack of practical strategies to properly allocate prisoners as a factor that contributes to matching vulnerable subjects with potentially more dangerous or homophobic inmates.<sup>197</sup>

Hensley presented a more nuanced elaboration of Sykes' theory, recalling the "pains of imprisonment" to undertake a deeper analysis of the relevance of regulation of sex and sexuality within the prison system. He acknowledges that heterosexual intercourses are not possible in prison, and that the public authority generally deems it illegal to engage into sexual conducts. However, the administration sometimes tolerates certain practices among inmates, while the latter tend to develop a tolerance towards same-sex sexual encounters, which in turn leads to consolidation of specific relational power dynamics among prisoners.<sup>198</sup>

Nevertheless, there is a tendency in criminological studies to qualify homosexuality inside prison as an "accident" that takes place temporarily in light of the special structure of prison, and to the loss of masculinity male prisoners face when admitted into a total institution.<sup>199</sup> Certainly, same-sex acts or masturbation are not categorised anymore as "abnormal" or "deviant" practices depending on the prison organisation,<sup>200</sup> as for instance Clemmer claimed, but it is true that the dynamics of power, gender relations, sex and sexuality in prison tend to be interpreted with naturalised approaches. This reiterates the problematic epistemological assumption that gender is binary and entrenched in a heteronormative relational scheme.<sup>201</sup> For example,

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<sup>195</sup> Jagose, n.15; Weeks, n.15; Sullivan, n.15.

<sup>196</sup> Mary Koscheski and others, 'Consensual Sexual Behaviour', in Hensley, C., *Prison Sex: Practice and Policy* (Boulder London: Lynne Rienner Publishers, 2002), 111- 131, at 112; Dumond mentions "young boys made homosexuals, either temporarily or permanently": Robert W Dumond, 'The Impact of Prisoner Sexual Violence: Challenges of Implementing Public Law 108-79 the Prison Rape Elimination Act of 2003' (2006), 32 *Journal of Legislation* 2, 142-164, at 146

<sup>197</sup> Mary Koscheski and others, id., at 113-115.

<sup>198</sup> Christopher Hensley, 'Introduction: Life and Sex in Prison,' in Christopher Hensley, *Prison Sex: Practice and Policy* (Boulder London: Lynne Rienner Publishers, 2002), at 1-12.

<sup>199</sup> Goffman, n.165.

<sup>200</sup> Tammy Castle and others, 'Argot Roles and Prison Sexual Hierarchy,' in Christopher Hensley, *Prison Sex: Practice and Policy*, (Boulder London: Lynne Rienner Publishers, 2002), 13-26.

<sup>201</sup> Connell, n.56; Sedgwick, n.20; Christine Delphy, 'Rethinking Sex and Gender' (1993), in Carole McCann and Kim Seung-Kyung, *Feminist Theory Reader: Local and Global Perspectives* (2<sup>nd</sup> ed., New York and London: Routledge 2009), at 56-68.

Kunzel reports that phenomena like “lesbianism” were considered as obvious effects of living in a space deemed irregular in itself.<sup>202</sup>

Additionally, such portrayal of sexuality overlooks the experience of bisexual individuals or the specific needs of lesbian women, whereas the situation of transgender people, especially of trans women in male prisons, is rarely analysed in terms of erotic desire.<sup>203</sup>

These categorisations can be queered. Ahmed notices that the experience of re-placing oneself in a new situation does not necessarily have to lead towards oppositional acts. It can also bring new hope, or a new sense of one’s identity.<sup>204</sup> The orientation of the self is realised by the “history of doing”, as the body that organises itself to the future does remember the past. Overall, the body that resettles itself also affects other bodies’ equilibrium.<sup>205</sup> In the prison context, the presence of transgender and sexually diverse individuals may originate new questioning among fellow inmates entrenched into hegemonic expressions of masculinity unchallenged until that moment.

On the other hand, disorientation also pertains to the way the space around the body is organised. Even objects can be disorientated, and contextually contribute to challenging the body who inhabits that space.<sup>206</sup>

On the contrary, the combination of systemic problems, such as overcrowding, and of the disciplinary power producing a heteronormative framework, not only determines an environment of sex negativity and essentialism, but also contributes to the establishment of a hierarchical sub-culture inside penal estates,<sup>207</sup> which establishes a specific discursive code inside prison,<sup>208</sup> favoured by legislative and administrative choices that create predefined categories based on sex, gender, sexual orientation, age, and type of crime.<sup>209</sup>

Prisoners’ sexual behaviour and status are classified through a series of slang terms, and homosexuality is used as a means of placing individuals within the inmate caste system.<sup>210</sup>

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<sup>202</sup> Kunzel, n.194, at 96 and following.

<sup>203</sup> On the general stigma existing in relation to certain orientations and identities, also within the LGBTQ movement, see Hines, n.72 and Monro, n.76; Kenji Yoshino, ‘Covering’ (2002), 111 Yale Law Journal 769; Kenji Yoshino, ‘The Epistemic Contract of Bisexual Erasure’ (2000) 52 Stanford Law Review 353 (2000).

<sup>204</sup> Ahmed, n.29, at 158-159.

<sup>205</sup> Ibid, at 160.

<sup>206</sup> Ibid, at 161.

<sup>207</sup> Goffman theorises that in total institutions diverse subcultures emerge, which are informed by specific rules and tend to elaborate a distinctive language to identify values and norms that confined subjects decide to follow (Goffman, n.165). This “code” is usually inflexible, and becomes part of the process of “prisonisation” that new inmates undergo when entering prison, in order to guarantee them a chance to achieve a certain status – and the power attached to it – in the prison hierarchy. See Julie Kunselman and others, ‘Nonconsensual Sexual Behaviour’, in Cristopher Hensley, *Prison Sex: Practice and Policy* (Boulder London: Lynne Rienner Publishers, 2002), 27-48.

<sup>208</sup> Hochdorn and Cottone, n.36.

<sup>209</sup> Helen Codd, ‘Women inside and out: Prisoners’ Partners, Women in prison and the struggle for Identity’ (2003), *Internet Journal of Criminology*, 1-24.

<sup>210</sup> Many studies on prison sexuality (Sykes, n.189; Donaldson, 2001; Kirkham, 1971; Sagarin 1976; Hensley, 1998-1999; Hensley, n.198) report the presence of several categories that are used to classify prisoners who entertain same-sex sexual acts. They may vary depending on the way individuals describe themselves; on the labels attached to them in prison argot (e.g. “fags,” “wolves,” “queens,” “sissies”), or in light of the role they play while having sexual intercourses with other inmates. Based on the period in time the research was conducted and on the prison community examined, the range of identified categories could change, though some findings are common to all works. For instance, a tendency has been



The use of prison argot stressing specific categories based on sexualised differentiations that are peculiar to the prison society has been interpreted by some researchers as evidence that identity can be socially constructed and that “sexual differentiation is often a site upon which to ground inequality.”<sup>211</sup>

As mentioned above, overcrowding and systemic power dynamics can favour an environment of sexual coercion.

Prior to the 1970s, Sykes’ model of sexual deprivation was used to justify the high rate of sexual violence in prison.<sup>212</sup> American prison research has explored the issue of sex and sexuality among inmates by focusing on non-consensual sexual activity. Generally, early studies on prison sex assumed “sexual intercourse to be invariably a quest for gratification, and they assumed sexual orientation to be fixed and polar.”<sup>213</sup> More recent investigations displayed a more nuanced approach in this area, yet they have maintained the strict divide between consensual and coerced sex. For instance, Tewksbury and West distinguish between safe manifestations of sexual conducts among inmates, to be understood, and non-consensual sexual activity, to be controlled.<sup>214</sup>

Yet, since the 1970s feminist scholars have argued that this dichotomy represents an over simplification of the reality of sexual relationships in the penal estate, where sex is often consensual, contrary to some studies’ assumptions, yet it can still be exploitative.<sup>215</sup> In particular, the intersection of queer and feminist studies helped in re-addressing the prison approach to sexual violence and sex discrimination by going beyond a qualification of perpetrator and victim along sexed lines.<sup>216</sup>

Indeed, the discourse on sexual violence and rape is often misleading, due to the misinterpretation – or non-consideration – of the peculiar dynamics of the prison environment. It is accepted that sexual violence has

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detected to distinguish those who play the active – therefore dominant – role in a relationship from the passive – thus submissive – partner, where the former is usually described as masculine, while the latter show more feminine characteristics; even the slang utilised to label them reflects this dichotomy. Furthermore, some researchers (Donaldson in Sabo 2001; Castle and others, n.200, at 13-26) have noticed that people who identified as homosexuals - even before entering prison – more frequently took the passive role in a confined setting. Kunzel accounts for the presence of cross-dressed inmates in American mid-20<sup>th</sup> century male prisons, and describes episodes of sexual intercourse between persons of the same sex that occurred both in male and female penal estates. She also documents that symbolic same-sex marriages were celebrated inside prison already in the first half of the 20<sup>th</sup> century (Kunzel, n.194). Interestingly, prison authorities at the time were aware of these episodes, yet they opted for closing an eye to them, while preventing the public opinion from being informed on what was happening within prison estates. Kunselman and others, n.207; Dumond, n.196, at 154; Don Sabo, Terry A. Kupers, Willie London, *Prison Masculinities*, Sabo, Kupers and London eds. (2001 Temple University Press, Philadelphia).

<sup>211</sup> Ristroph, n.185, at 149-152; Hensley, 13-26; Butler, n.32; Jagose, n.15. On the other hand, the data analysis will show that some participants perceived the use of what outsiders would characterise as homophobic jokes or labels by other prisoners as a form of bonding that helped them feeling accepted in the wing.

<sup>212</sup> Paul Simpson and others, ‘Sexual Coercion in Men’s Prison’, in Matthew Ball, Thomas Crofts and Angela Dwyer eds., *Queering Criminology* (Palgrave Macmillan 2015), 204 - 228.

<sup>213</sup> Ristroph, n.185, at 143.

<sup>214</sup> Richard Tewksbury and A West, ‘Research on Sex in Prison during the late 1980s and the early 1990s’ (2000), 80 *The Prison Journal* 4, 368-378, at 377.

<sup>215</sup> Ristroph, n.185, at 142-144; Susan Brownmiller, *Against Our Will: Men, Women, and Rape* (Simon and Schuster 1975).

<sup>216</sup> Franke, n.100; Russell Robinson, ‘Masculinity as Prison: Sexual Identity, Race, and Incarceration’ (2010), 99 *California Law Review*, 1309 – 1408; Cohen, n.7.

specific devastating effects in prison, and that a failure to prevent it and provide a response for its consequences constitutes a human rights violation.<sup>217</sup> However, policies based on increasing surveillance and segregating vulnerable prisoners do not consider the more complex problem of societal production of violence and hegemonic norms.<sup>218</sup> The way the penal estate is organised especially oppresses queer inmates, as queerphobia is foundational to the very system of imprisonment.

First, unclear definitions of what constitutes a sexual assault do not help in distinguishing (sexual) violence, rape and other forms of apparently consensual sexual practices.<sup>219</sup> The way relationships are established in confinement makes it hard to distinguish between consensual and non-consensual sexual arrangements: for instance, certain couples can be established mostly for one or both partners to obtain protection from other prisoners. Even so, the relationship may be based on anything but consent, since one or both prisoners would never agree to such an arrangement if they were free.<sup>220</sup>

Moreover, the notion of sex presents incredible complexity. Katherine Franke argues that the American legislation on sexual harassment has a tendency to focus on the sexual act in itself while losing sight of the way sex is used in a certain moment and in a certain context. Sex can be a site of transfer of power within a gender dimension or in relation to sexual orientation. It is not simply an issue of bodily acts, but a question of what relational dynamics comes into place between subjects, and what hierarchy characterise the individuals involved.<sup>221</sup>

It should be acknowledged that sex could be used as a trading tool between inmates: legal prohibition of sex in prison has led – according to some authors – to the consolidation of an “underground economy” within penal estates.<sup>222</sup>

Ristroph argues that the sexualisation of personal connections among inmates, along with the strict sexual segregation informed on a strong masculine culture facilitates the recourse to sex as an instrument of domination.<sup>223</sup>

Reports on sexual coercion among female prisoners are rarer and might signify that the phenomenon is less common among confined women. However, Alarid contends that episodes of sexual violence among women

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<sup>217</sup> See Simpson and others, n.212.

<sup>218</sup> Ibid.

<sup>219</sup> Kunselman and others, n.207, at 27-28; Ristroph, n.185, at 145-146.

<sup>220</sup> Despite the difficulties in defining the various forms of sexual harassment or prison rape that could arise, research findings confirm that individuals suffer various types of sexual abuse besides rape. Ristroph, n.185; Kunselman and others, n.207, at 28-47.

<sup>221</sup> Franke, n.100.

<sup>222</sup> Perspectives on the topic tend to change depending on the socio-historical context: in the 1980s, American studies on male prison confirmed the link between the widespread occurrence of episodes of sexual violence and the necessity to reaffirm someone's power over the other prisoners, or to trade it with other goods or services (Kunselman and others, n.207, at 30-33). Conversely, in the 1990s research was mostly limited to – and influenced by – the diffusion of HIV/AIDS, and its correlation with the exercise of sexual acts among prisoners (Kunselman and others 2002, at 33-35). In both decades researchers collected a consistent amount of data highlighting the pervasive exploitation of sexual coercion in prison. See e.g. Robinson, n.216.

<sup>223</sup> Ristroph, n.185, at 147-148.

go underreported. This phenomenon could depend on women's unwillingness to engage in problematic confrontations with other inmates, and with the prison administration.<sup>224</sup>

Collecting data regarding these phenomena is particularly complicated, depends on the lack of consensus on a clear definition of the crime, but also on prisoners' reluctance to report similar incidents. Men are especially ashamed to admit that they have been raped or sexually harassed,<sup>225</sup> which relates both to the masculine culture instilled into prison life, and to the stigma of homophobia attached to the victimised representation of the passive sexual role.<sup>226</sup>

A queer perspective on this issue attempts to go beyond an analysis based only on sex activity to embrace a more comprehensive approach that examines prison as a queer space.<sup>227</sup> It highlights that not only problems of the trans/queer community should be addressed, but the penal space should be discussed as an expression of gendered institution.<sup>228</sup> The same denial of sexual encounters and agency that is characteristic of prison policies "is a quintessential queer experience."<sup>229</sup>

The gendered nature of the institution is assumed to give rise to a violent and unequal environment, based on social norms that favour sexualised, hypermasculine power relations.<sup>230</sup>

Nonetheless, Kunzel observes that analysing prison sex exclusively from a dominance/power perspective, although useful shedding light on the dynamics of prison (sexual) violence, can be used to justify why heterosexual men have same-sex intimate encounters while silencing the possibility that such relationships may originate from same-sex desire.<sup>231</sup> Narratives of power can also be exploited to deny transgender women the right to be hosted in female prison for fear they can act as "sexual predators."

The ultimate proposition of some queer streams consists of the idea that abolishing prison as a form of punishment as the only strategy to overcome sexual and gender minorities' vulnerabilities.<sup>232</sup> Such an outcome links with their scepticism towards the gay and lesbian movement strategy to achieve recognition through legal equality. They take as an example the advocacy of same-sex marriage and anti-discrimination legislation, which does not tackle the specific administrative issues regarding sexual minorities in confinement or other less acceptable categories' concerns.<sup>233</sup> Furthermore, the existence of a problematic tension between the law and queer subjects who live outside the norm is reflected in the law's tendency to extend its normative power

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<sup>224</sup> Kunselman and others, n.207, at 34-36.

<sup>225</sup> Ibid (2002).

<sup>226</sup> Wayne Wooden and Jay Parker, *Men behind bars: sexual exploitation in prison* (New York: Plenum Press, 1982); Sabo and others, n.210; Dunn, n. 133; Connell, n.56.

<sup>227</sup> Mogul and others, n.181.

<sup>228</sup> Sarah Lamble, 'Transforming Carceral Logics: 10 Reasons to Dismantle the Prison Industrial Complex Using a Queer/Trans Analysis' (2011), in Stanley, A. E., *Captive Genders: Trans Embodiment and the Prison Industrial Complex* (Edinburgh, Oakland, Baltimore: AK Press 2011).

<sup>229</sup> Ibid.

<sup>230</sup> Stanley, n.62, at 3. Ristroph, n.185.

<sup>231</sup> Kunzel, n.194.

<sup>232</sup> Ibid, at 121 and following.

<sup>233</sup> Ibid.

to some LGBT groups more than others. However, this thesis intends to focus on a critical queer analysis towards criminal justice concerns that not only stresses the undoubtedly negative impact of the carceral system,<sup>234</sup> but also possible spaces for reform. As Ball observes, the CJS has fuelled the marginalisation of the LGBTQ community, yet victims of homophobic and transphobic violence have needed to connect with law enforcement officials to find protection.<sup>235</sup>

## 2.10 Further considerations on sexuality in female prisons

Women's challenges during imprisonment have been the specific focus of a number of prison studies. The feminist penological research of the 1970s and 1980s included issues related to women in the debate around prison, in order to ensure that prison research was not associated anymore with the problems of male prisoners only.<sup>236</sup>

The first studies on homosexual behaviour in female prisons were conducted in the 1960s. Nonetheless, it was only in the 1980s that literature in the UK included feminist research on women and criminology.<sup>237</sup> Writers have noticed that women experience prison in a different way than men: the "pains of imprisonment" affect them more severely, since they are both burdened with higher social expectations and they are usually the ones taking care of families' daily management.<sup>238</sup> Besides, the masculine organisation of imprisonment determines a series of problems regarding the difficulty in adapting rehabilitative treatments and health care services designed for men to a female environment.<sup>239</sup>

Sim notices a connection between the need that society has always manifested of controlling women, and the image of the female lawbreaker as someone who is affected by some form of pathology.<sup>240</sup> Consequently, female prisoners have often been treated as "masculine, mad, menopausal and maladjusted to their roles in the family and labour market."<sup>241</sup> Feminist research helped to put imprisonment in perspective, by analysing "the role of prison in enforcing patriarchal expectations about appropriate femininities", pointing out how women who do not conform to this ideal are subject to the "gendered controls of prison."<sup>242</sup>

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<sup>234</sup> Stanley, n.62; Spade, n.68.

<sup>235</sup> Ball, n.48.

<sup>236</sup> Bosworth and Carrabine observe that all main research on prison revolves around men, while women are convicted for different crimes, have different experiences during imprisonment, and specific needs. In spite of a rich field of research on women in prison, few male authors cite female writers, or consider the feminist point of view. Mary Bosworth, Eamon Carrabine, 'Reassessing Resistance – Race, Gender and Sexuality in Prison' (2001), 3 *Punishment and Society* 4, 501-515; see also Barbara Owen, *In the Mix: Struggle and Survival in a Women's Prison* (State University of New York Press 1998).

<sup>237</sup> Helen Codd and David Scott, *Controversial Issues in Prisons* (Open University Press, Maidenhead, UK 2010), at 34.

<sup>238</sup> Scott and Codd, id. See Pat Carlen, 'Introduction: Women and punishment', in Pat Carlen ed., *Women and Punishment. The struggle for justice* (Willan Publishing 2002).

<sup>239</sup> Carlen, *ibid.*

<sup>240</sup> Codd and Scott, n.237, at 35.

<sup>241</sup> Pat Carlen and Anne Worrall (Eds.), *Gender, Crime and Justice* (Open University Press, 1987), at 8.

<sup>242</sup> Codd and Scott, n.237, at 37.

Contemporary streams of feminist criminology have also started considering gender as an action in response to contextualised norms, and the intersecting inequalities of gender with other factors such as race, social class or sexuality.<sup>243</sup>

In this sense, attempts to explain women's criminal conducts through the lens of biological and medical terms have been re-examined in the way they affected the description of female inmates' sexuality and relationships inside the penal estate.

Carlen finds that prison policies encourage the idea of a mono-dimensional woman who engages in activities that are suitable to express her femininity, such as sewing or hairdressing.<sup>244</sup> She also highlights that women undergo a higher level of surveillance than men and are exposed to stricter disciplinary regimes.<sup>245</sup>

Ward and Kassebaum, and Giallombardo reported a similar labelling process as the one occurring in male penal estates to describe women's sexual roles in prison.<sup>246</sup> Distinctions were made between "true homosexuals" or "lesbian", i.e. inmates who were homosexual before incarceration, and "turnouts", who began engaging in same-sex sexual activities once they entered prison.<sup>247</sup> Even in the female estate a specific jargon was employed to distinguish between the person playing an active role (e.g. "butch") and the one being submissive (e.g. "femme") within the relationship. The fact that the "butch" usually presented more masculine traits and appearances than the "femme" constitutes another example of reiteration of the gender binary divide as developed in the society outside.<sup>248</sup> A label was also created for women who were not willing to engage in a same-sex relationship: "squares".<sup>249</sup>

However, more recent research has showed a change in the way interactions and relations are organised among women inmates.<sup>250</sup> The abovementioned jargon seems to have disappeared, as well as the attribution of social characteristics according to the role played in the relationship, although some studies still report that a difference is still being made between lesbians – i.e. women who were "out" even before prison – and turnouts or bisexual – who started engaging in same-sex relationships after imprisonment.<sup>251</sup>

Interestingly, the description of social dynamics within penal institutions appears to be influenced by two important factors: changes in the social norms regulating the public community outside, and the different epistemological and methodological choices made by the researcher, which could also be potentially affected by stereotypical assumptions.<sup>252</sup> For instance, early studies on female sexual conducts inside prison held by

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<sup>243</sup> Claire M Renzetti, 'Feminist Perspectives', in Walter S DeKeseredy and Molly Dragiewicz, *Routledge Handbook of Critical Criminology* (2<sup>nd</sup> edition, Routledge 2018).

<sup>244</sup> Codd and Scott, n.237, at 38.

<sup>245</sup> *Ibid.*

<sup>246</sup> Kunselman and others, n.207, at 20.

<sup>247</sup> *Ibid.*

<sup>248</sup> Kunselman and others, n.207, at 21-22.

<sup>249</sup> *Ibid.*

<sup>250</sup> Kimberley Greer, 'The changing nature of interpersonal relationships in a women's prison' (2000), 80 *The Prison Journal* 4, 442-468.

<sup>251</sup> Koscheski and others, n.196.

<sup>252</sup> Koscheski and others, *ibid*; Buist and Lenning, n.11.

American scholars focused on prisoners' tendency to re-create forms of familial kinship in confinement. Giallombardo concluded that this was due to the "social, psychological or physiological deficiencies" of female inmates.<sup>253</sup> The strongest alliances appeared to endure among homosexual groups acting like a family informed on marriage-like bonds,<sup>254</sup> performing all the functions [of the] biological family (economic, protective, affectionate, recreational and social) with the exception of reproduction".<sup>255</sup>

In the 1970s and 1980s, researchers stressed the emergence of arrangements based on the concept of biological family, similar to the findings of the previous decade.<sup>256</sup> Yet, this structure has been questioned in more recent times.<sup>257</sup> For instance, Hensley, Koshenski and Tewksbury observe that other factors influence the type of relationships, such as age or the length of sentence: the longer the punishment, the more easily it happens that inmates create more stable relationships inside.<sup>258</sup>

Prison research has more recently started to describe different levels of acceptance of intimate relationships during imprisonment, as well as different causes for prisoners to start them, and different consequences on the prison environment and prisoners' sense of self stemming from it. However, there is agreement in identifying women's approach to prison sexuality in different terms than men, generally characterised by more openness to the phenomenon.<sup>259</sup> In addition, the diverse meanings attached to the concept of sexual conduct are considered by analysing various forms of sexual behaviours (e.g. from kissing to performing or receiving oral sex) as separate variables.<sup>260</sup>

Such an approach has helped in overcoming the inherent patriarchy of previous research on female imprisonment. It avoids misinterpreting the expression of sexual and intimate desires of women inmates in light of a misogynistic portrait of women.<sup>261</sup> This translates into challenging the assumption that women who breach the law betray the ideal of femininity modelled by societal expectations.<sup>262</sup>

Female inmates have fought their subjugation to the masculine prison estate industry through the constitution of strategies of personal and collective resistance,<sup>263</sup> whether they consist of protest demonstrations or of taking advantage of their personal appearance. Bosworth questions if this proves women's capability to subvert the stereotypical meaning of femininity as promoted by prison policies, or whether they instead adapt themselves

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<sup>253</sup> Rose Giallombardo, 'Social Roles in a Prison for Women' (1966), 13 *Social Problems* 3, 268-288.

<sup>254</sup> *Ibid.*

<sup>255</sup> Koscheski and others, n.196, at 123.

<sup>256</sup> For example, Propper observed already in the 80s that a homosexual subculture existed in women's prisons, to be distinguished in her opinion from the formation of make-believe family, though she classified both of them as forms of adaptation to prison life. Koshenski and others, n.196, at 118-127; Alice Propper, 'Make-believe families and homosexuality among imprisoned girls' (1982), 20 *Criminology* 1, 127-138.

<sup>257</sup> Greer, n.250, at 442-468.

<sup>258</sup> They also found younger women tend to be more apt to engage into same-sex sexual activity.

<sup>259</sup> See Greer, n.250, at 442-468.

<sup>260</sup> Koshenski and others, n.216.

<sup>261</sup> Kunzel, n.194.

<sup>262</sup> Codd and Scott, n.237, at 44.

<sup>263</sup> Bosworth & Carrabine, n.236.

to play within the rigidly imposed role-scheme of prison.<sup>264</sup> In either case, identity is anyway continually challenged.

Hannah-Moffat may suggest an answer to this query when she asserts that attempts to introduce women-centred reforms within prison without challenging the existing power relations between the controller and the controlee, or the medical discourses concerning female imprisonment, fail to alleviate the gendered character of the prison experience.<sup>265</sup> These so-called gender responsive strategies formally benefit from the inclusion of feminist discourse in the elaboration of non-male centric policies to women imprisonment, yet they have failed to indicate the real meaning of “gender responsiveness”, while their enforcement has revealed a number of complex issues, an important one being the excessive attention to managerial practices.<sup>266</sup> Ultimately, the gender-oriented approach has remained inherently stereotypical in representing the feminine woman, who is abstractly conceived as maternal, more keen on maintaining relationships, and family-oriented.<sup>267</sup> In spite of the progress made in approaching questions of female imprisonment, the conceptualisation of women prisoners’ issues remains profoundly gendered.

## 2.11 The pains of transgender individuals within the prison complex

The debate concerning LGBT(Q) rights has highlighted the risk of conflating the specific problems of the transgender community with the ones of LGB people. This is also evident in certain aspects of prison life; Kunzel notices how during the mid-20<sup>th</sup> century, in American prisons homosexuality was often overlapped with cases of inmates engaging in cross-dressing practices, or with the presence of transgender individuals in prison.<sup>268</sup> The discourse based on censorship, pathologisation and essentialist interpretations of sex and gender did not distinguish between diverse forms of “deviance,” a phenomenon that is replicated by current manifestations of prison disciplinary power.

In parallel, the tendency of legislation and society towards constructing “acceptable homosexualities” in the public discourse risk marginalising and discriminating against those people who are not perceived as “respectable” enough.<sup>269</sup> Trans people are subject to heavier suffering from institutional inequality. They may be especially targeted as they more easily experience socio-economic marginalisation and stigma after imprisonment, while they face a very hostile environment since their very entrance in the CJS. Particularly,

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<sup>264</sup> Ibid.

<sup>265</sup> Codd and Scott, n.237, at 36.

<sup>266</sup> Kelly Hannah-Moffat, ‘Sacrosanct or Flawed: Risk, Accountability and Gender-Responsive Penal Politics’ (2010), 22 *Current Issues in Criminal Justice* 2, 193-215.

<sup>267</sup> Ultimately, she underlines the need for a less risk based model to address female imprisonment that could avoid a gendered depiction of the female inmate.

<sup>268</sup> Kunzel, n.194.

<sup>269</sup> Stychin, n. 119.

prisons are hardly equipped to address their particular needs.<sup>270</sup> Their vulnerability has been described as “a continuum into the prison context, of high levels of social exclusions and discrimination that exist in the general community towards transgender individuals.”<sup>271</sup>

Whittle has underlined that trans people are overrepresented in the English penitentiary system.<sup>272</sup> Statistics probably do not capture the exact number of all the trans people in confinement, in light of the difficulties in estimating the population size, which also includes pre-operative transgenders, or persons who do not wish to undertake surgery, or are transitioning at the time of imprisonment. Even if transgender people represent a small portion of the general prison population, data are essential for the prison administration to elaborate appropriate policies to ensure that acceptable living conditions for transgender inmates are guaranteed, in terms of healthcare, access to service, protection from discrimination, violence and harassment.<sup>273</sup>

Although conflation of sexual minorities and gender minorities’ problems should be avoided, the LGBTQ community share common experiences of marginalisation as a contradiction to heterosexual modes of behaviour, and certain phobic attitudes presents similar normative underpinnings.<sup>274</sup>

Among the concerns regarding the treatment of transgender prisoners, the first criticality arises at the very initial moments of the prison experience, when the inmate must be allocated into a female or male estate. The literature underlines the fixity of the prison system, which is still structured on the basis of a dualistic model of sexes.<sup>275</sup> This model of separating prisoners does not take into account the overall physical appearance and clothing of the confined individual, putting at risk their right to privacy, human dignity and even bodily safety.<sup>276</sup>

In England and Italy, the material issues of allocation have been dealt with in different ways, but there is still heavy reliance on the individual’s biological sex registered on the birth certificate, which makes it difficult for transgender inmates to prove their gender identity. This can often lead to separation of transgender people (sometimes together with homosexual prisoners who are not necessarily transgender, or by placing them in the sections reserved for sexual offenders). This determines the impossibility – or very limited opportunity – for transgender prisoners to access prison services and activities, as well as to enjoy social visits.<sup>277</sup> In extreme

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<sup>270</sup> Lorenzetti, n.91; Adriana Dias Vieira and Sofia Ciuffoletti, ‘Section D: a Tertium Genus of Incarceration? Case-study on the Transgender Inmates of Sollicciano Prison’ (2014), 2 *Journal of Law and Criminal Justice* 2, 209 – 249; Richard Edney, ‘To Keep Me Safe From Harm? Transgender Prisoners and the Experience of Imprisonment’ (2004) 9 *Deakin Law Review* 2, 327; Lindsey Poole and others, ‘Working with Transgendered and Transsexual People as Offenders in the Probation Service’ (2002), 49 *Probation Journal* 3, 227-232.

<sup>271</sup> Edney, *ibid*, at 328.

<sup>272</sup> Whittle (2002), n.16.

<sup>273</sup> Lorenzetti, n.91; Poole and others, n.270.

<sup>274</sup> Whittle, Turner and Al-Alami, n.91.

<sup>275</sup> Lorenzetti, n.91; Whittle Turner and Al-Alami, *id*; Whittle (2002), n.16; Rosenblum, n.80; Vade, n.80; Dias Vieira and Ciuffoletti, n.270; Lamble, n. 228.

<sup>276</sup> Lorenzetti, n.91.

<sup>277</sup> Lorenzetti, n.91; Dias Vieira and Ciuffoletti, n.270; Whittle (2002), n.16; Rosenblum, n.80; Vade, n.80; Edney 2004; Mogul and others, n.181.



circumstances, such arrangements can amount to solitary confinement and constitute a human rights violation.<sup>278</sup>

The literature on prison conditions in relation to non-conforming sexualities, particularly on sexual violence, harassment, rape, family and private visits, describes problems that involve also the transgender prison population. According to some commentators, the problem of sexual violence against trans inmates should incite a reflection on the legitimacy of imprisonment as a punishment, when the penitentiary system is clearly not suitable to tackle gender identity – related issues, mainly for the hegemonic masculinity embedded within the prison environment.<sup>279</sup>

Experts notice how transgender prisoners are considered a “disturbing element” within prison, disrupting a consolidated structure that does not represent social diversity and inclusivity. This becomes even more apparent when it comes to the respect of transgender prisoners’ right to health. This category of inmates needs specific medical treatment, depending at what stage of the transitioning process they are, and even more necessarily in case hormone treatments are due.<sup>280</sup>

Studies tend to conclude that prison policies do not take into due consideration the concerns of transgender individuals, consequently making them a particularly vulnerable category among the prison population.

## 2.12 Visitation programmes: supporting the heteronormative family model

The blindness of the system as regards sexuality in prison, as well as the assessment of rehabilitation in relation to the importance for prisoners to maintain family relationships, encouraged several writers to analyse the effects of introducing family or private (or conjugal) visitation programmes within prison.<sup>281</sup>

Family visits serve to maintain family relationships and are normally conducted under the staff’s surveillance.<sup>282</sup> The definition of “family” and “partner” gives rise to questions, as they seem often linked with a stereotypical depiction of institutions and relationships.<sup>283</sup> It often remains uncertain whether partners must be married or entered into any kind of registered or de facto partnerships to enjoy family and private visits. Besides, the situation of transgender inmates and their specific experiences, as well as of other relationships that cannot be associated with the notion of traditional family, have not been considered so far.<sup>284</sup>

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<sup>278</sup> Johnson, n.117; Danisi, n.115; For an in-depth analysis of the literature on solitary confinement, see Peter Scharff Smith, ‘The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature’ (2006), 34 *Crime and Justice*, 441 – 527.

<sup>279</sup> Edney, n.270.

<sup>280</sup> Lorenzetti, n.91; Lamble, n.228; Vade, n.80; Edney, n.270.

<sup>281</sup> Ronald G Turner, ‘Sex in Prison’ (2000), 36 *Tenn. Bar Journal* 12; Cristopher Hensley and others, ‘Conjugal Visitation Programs: The Logical Conclusion’ (2002), in Hensley C, *Prison Sex: Practice and Policy* (Boulder London: Lynne Rienner Publishers, 2002), 143-156.

<sup>282</sup> Codd and Scott, n.237, at 144-153.

<sup>283</sup> *Ibid.*, at 146.

<sup>284</sup> *Ibid.*

De Claire and Dixon examined ten relatively recent studies on prison visitations programmes.<sup>285</sup> They observed that all the examined contributions had sample limitation problems, and all focused on heterosexual relationships only. Despite these criticalities, their review supported “previous research and reviews that suggest prison visits have positive effects on well-being and offending behavior internationally. The results suggest that one promising avenue would be for governmental and prison policy to support prisoners receiving family visits.”<sup>286</sup> They however suggest further data are needed to obtain reliable outcome measures in order to draft a comprehensive theoretical framework on such programmes.

Conjugal visits refer instead to programmes run by prisons allowing inmates or spouses to spend personal time together on the penal estate ground, during which they may engage in sexual intercourse.<sup>287</sup>

Many countries provide conjugal visits globally, in Europe and elsewhere, although neither Italy nor England foresee them under prison legislation and policies. There are several reasons why supporters of conjugal visits believe they should be introduced within the penitentiary system: they mention maintaining family stability and reducing violence inside prison.<sup>288</sup> More problematically, they encourage them in order to reduce homosexual behaviour among inmates,<sup>289</sup> although researchers have found that there were different views on the issue between the prison staff – who do not believe in the possible benefits of these visitation programmes – and prisoners, who on the contrary thought that it would help in increasing family stability and reducing violence in prison.<sup>290</sup> American studies seem to agree with the latter, as they highlight a link between the establishment of similar programs in American prisons, and the reduction of disciplinary measures against inmates.<sup>291</sup>

Research underlines the importance of allowing conjugal visits in relation to the preservation of marriage and family stability.<sup>292</sup> Concerning violence containment, prison staff who approve these programs focus on their function as “behavioural-control mechanisms”, thus apparently relating the abovementioned policy more to a power-management dimension than to a rehabilitative scope of imprisonment, including the respect of human dignity, and gender and sexual diversity.

Concerning the effects of conjugal visits on homosexual behaviour inside prison, the claim that they contribute to reduce same-sex sexual contacts has not been substantiated by conclusive findings.<sup>293</sup> This approach to the issue of homosexuality once more overlooks the presence of plural sexual orientations and gender identities

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<sup>285</sup> Karen De Claire, Louise Dixon, ‘The Effects of Prison Visits From Family Members on Prisoners’ Well-Being, Prison Rule Breaking, and Recidivism: A Review of Research Since 1991’ (2015), 19 *Trauma, Violence and Abuse* 3, 185-199.

<sup>286</sup> *Ibid*, at 198.

<sup>287</sup> Hensley and others, n.281, at 143.

<sup>288</sup> *Ibid*, at 149.

<sup>289</sup> *Ibid*.

<sup>290</sup> Burstein (1977) in Hensley, n.281.

<sup>291</sup> James Howser and others, ‘Impact of family reunion programs on institutional discipline’ (1983), 8 *Journal of Offender Counseling, Services and Rehabilitation*, 27-36; Norman Holt, Donald Miller, *Prisoner and Family Relationship Recidivism Study*, Research report No. 46 (California Department of Corrections Sacramento, California 1972).

<sup>292</sup> Hensley and others, n.281.

<sup>293</sup> *Ibid*, at 152.

within the penal system, and reiterates a narrative characterising homosexuality as a disorder. This could depend also on the different degree of social and legal acceptance regarding same-sex sexuality at the time these studies were published.

There is also some criticism regarding conjugal visitations programmes, especially in relation to the possibility that they facilitate the distribution of illicit substances in prison (e.g. drug smuggling during visits; backlash from public opinion; arousal of tensions among prisoners, particularly originating from those who could not meet the requirements to apply for a conjugal visit; and the risk of HIV diffusion).<sup>294</sup>

## 2.13 Concluding remarks: queering the essentialist prison space

A specific power/knowledge dynamic is enforced inside prison, which Foucault pinpoints as hierarchical surveillance and enactment of normalising practices and behaviours.<sup>295</sup> Ordinary social interactions “are subsumed by relations of institutional power.”<sup>296</sup> Foucault’s reflections on prison are complementary to Goffman’s interest in closed environments such as prisons where identity is shaped by the way the institution acts on the self, and the way the individual performs acts of resistance.<sup>297</sup>

This institutional power dynamic conflates sex with gender in essentialist terms, and considers sexual orientation as the “the sexual component of gender,” where gender comprises both the social and sexual dimension of society.<sup>298</sup> If gender is deduced by sex, its representation is fixed and binary.<sup>299</sup> At the same time, the carceral state attaches to the sex-gender paradigm heterosexist and patriarchal traits: the male gender is always active and takes advantage of the female, passive component, while the typical sexuality must comply with the active/passive paradigm in a system where the “normal” performance of gender coincides with the identification with sex. Thus, same-sex desire becomes an “official form of sex/gender incorrectness.”<sup>300</sup>

The prison complex reflects, reiterates and brings to the extreme a “sex/gender system” developed outside; the fluidity and variability of gender does not emerge from this scheme, on the contrary it remains fixed and “intransitive.”<sup>301</sup>

However, the reality of the prison environment is not as straightforward and unidirectional as it may seem. The body, the space and the orientations that this relationship originates are multiple and interconnected.<sup>302</sup>

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<sup>294</sup> Ibid, at 153-155.

<sup>295</sup> Foucault, n.5.

<sup>296</sup> Abigail Rowe, ‘Narratives of self and identity in women’s prisons: Stigma and the struggle for self-definition in penal regimes’ (2011), 13 *Punishment & Society* 5, 571 – 591, at 587.

<sup>297</sup> Goffman, n.165. Rowe, n.296, at 574.

<sup>298</sup> On the relationship among sex, gender and sexual orientation, and their conflation, see Valdes, n.32, at 13-15.

<sup>299</sup> See Gayle Rubin, ‘The Traffic of Women: Notes on the “Political Economy” of Sex’, in Rayna R. Reiter (ed.), *Towards an Anthropology of Women*, Monthly Review Press 1975, 157-210, at 157, 159. Rubin, n.17. See also Valdes, n.32.

<sup>300</sup> Valdes, n.32, at 51.

<sup>301</sup> Ibid, at 40

<sup>302</sup> Ahmed, n.29.

Queer theory offers an important contribution in dissecting this bundle of connections. Particularly, it challenges the common interpretation developed in social sciences that sexual orientation, gender identity and gendered behaviour are completely separate and independent.<sup>303</sup> On the contrary, “intra-active entanglements” between gender and sexuality deserve attention.<sup>304</sup> The conflation between sex and gender, gender and sexual orientation originating inside prison shall be “queered” and unpacked to let the complex connections among different categories emerge.<sup>305</sup> As Maurice Merleau-Ponty theorised, moments of disorientations create disorder, but are also a source of vitality.<sup>306</sup>

Sexual orientation represents a relational concept in itself, which concerns relationships among bodies, and the sexual directions our bodies move towards.<sup>307</sup> But gender identity can also be thought of in terms of orientation, in the sense that gender expression is connected to gendered ideas of masculinity and femininity. When the body is characterised in light of masculine or feminine assumptions, these representations also involve pre-conceptions on someone’s sexual orientation. Orientating oneself not only affects individuals’ sexual behaviours, but defines our relation to the world. Orientations can be multiple depending on the object of our orientation, whereas different objects can produce multiple orientations.<sup>308</sup> This presents a series of consequences: first, discussing orientation(s) means also discussing identities. Furthermore, the movement towards other bodies or other objects can be disorienting, and create breaches in our identity self-perception; lastly, (dis)orientations not only influence the sexual component of being, but also gender, as they “can involve discomfort with the norms of behaviour determined by our assigned gender – or it might emerge as a sense of disconnection from that gender altogether” (such as gender dysphoria).<sup>309</sup>

Gender identity is a product of sexuality, and one is not really “woman” or “man”, but it does these categories by complying with certain social norms. Such repetition of gender is inscribed into heteronormative assumptions.<sup>310</sup>

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<sup>303</sup> Sade Kondelin, *Dis/Orientations Of Gender and Sexuality in Transgender Embodiment* (2014), 1-2 Society of Queer Studies Journal, 32 – 43.

<sup>304</sup> Ibid, at 33. Diane Richardson, ‘Patterned Fluidities: (Re)imagining the Relationship Between Gender and Sexuality’ (2007), 41 Sociology 3, 457-474.

<sup>305</sup> Mogul et al. observe that prisons are highly gendered, hypermasculine environments where deviance from what is considered “normal sexuality” is punished through sex segregation, homophobia and in extreme cases, (sexual) violence. Forced same-sex cohabitation is accompanied by prohibitions of any forms of intimate or sexual contact, thus marginalising open queer individuals, but also men who present feminine attitudes or traits, who are identified by prison staff and other prisoners as homosexual. Their gender ends up being deduced by their sexual appearance, and labelled as atypical. Even their sexual orientation is assumed from certain sexual characteristics stereotypically associated with one specific gender. See Mogul and others, n.181; Dunn, n.133; Cohen, n.7.

<sup>306</sup> Maurice Merleau-Ponty, *Phenomenology of Perception* (Routledge, London 1962).

<sup>307</sup> Ahmed, n.29, 79-85.

<sup>308</sup> Id., at 5-6 and 157.

<sup>309</sup> Kondelin, n.303, at 37.

<sup>310</sup> Butler, n.32; Judith Butler, *Bodies that Matter: On the Discursive Limits of “sex”* (Psychology Press, 1993); Lorenzo Bernini, *Queer Apocalypses: Elements of Antisocial Theory* (Palgrave MacMillan 2017). Bernini underlines Butler’s debt towards Foucault and psychoanalytic feminism, which put sexuality at centre stage. For a tentative classification of feminist streams, see Tong, n. 40.

The regulation of sexuality and gender within the prison complex goes against variation and is characterised by what Foucault identified as a normative superstructure aimed at controlling unnatural sexualities.<sup>311</sup> Laws and penal policies contribute to the often successful attempt of controlling them on the basis of order, security and morality claims.<sup>312</sup> Nevertheless, a queer approach to this framework can reveal episodes where the display of power is not always necessarily negative, but it is important to acknowledge its existence and its productive character.<sup>313</sup>

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<sup>311</sup> Foucault, n.20; Foucault, n.5.

<sup>312</sup> Foucault, n.5; Ristoph, n.185.

<sup>313</sup> Richardson, n.304, at 471.

## Chapter 3

# Methodology

### 3.1 Introduction

The research adopts a queer socio-legal approach. The socio-legal methodology is also known as “law in context.”<sup>314</sup> Among different definitions of socio-legal, Wheeler and Thomas’ statement probably best reflects the methodology and methods used by this research:

*‘[t]he word “socio” in socio-legal studies means to us an interface with a context within which law exists, be that a sociological, historical, economic, geographical or other context.’*<sup>315</sup>

Hence, this study is “legal” as it undertakes a comparative analysis of law in two European jurisdictions, England and Italy. The interface between the doctrinal and the empirical is performed through a qualitative analysis of the impact of law in practice, based on semi-structured interviews conducted with prisoners who self-identify with non-heterosexual, non-cisgender identities and were hosted in prisons located in both countries at the time of data collection.

This choice derives from the realisation that the study of the effects of the institutional and normative prison framework on manifestations of sexuality and gender identities during imprisonment would have benefitted from a law in context analysis, also because of the relative scarcity of studies on sexual activity, intimacy, and queer lives during imprisonment in British, but particularly in Italian literature.<sup>316</sup> A doctrinal approach risked being short in capturing the criticalities underpinning the heteronormative, gender binary prison complex.<sup>317</sup> Furthermore, prisoners, especially if homosexual, lesbian or transgender, are rarely heard by researchers notwithstanding their direct involvement with the issues under scrutiny, while sexuality and gender expressions are often overlooked, or interpreted in essentialist terms, by law.<sup>318</sup>

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<sup>314</sup> See Fiona Cownie and Anthony Bradney, ‘Socio-Legal Studies – A challenge to the doctrinal approach’, in Dawn Watkins, Mandy Burton eds., *Research Methods in Law* (Routledge 2018), 41.

<sup>315</sup> *Ibid*, at 42.

<sup>316</sup> Alisa Stevens, ‘Sexual Activity in British Men’s Prisons: A Culture of Denial’ (2017), 57 *The British Journal of Criminology* 6, 1379 - 1397; Dunn, n.133; Poole and others, n.270. Italian literature looking at the issues of transgender prisoners comprise: Dias Vieira and Ciuffoletti, n.270; Lorenzetti, n.91. The topic of intimate relationships in prison has been addressed by Silvia Talini, ‘L’affettività ristretta’ (2015), *Costituzionalismo.it*, fasc. 2; Marco Bracoloni, ‘Detenzione e Nuclei Stabili LGBTI I diritti di una fragile libertà’ (2014), in Carlo Casonato and Alexander Schuster eds., *Rights On The Move – Rainbow Families in Europe. Conference proceedings*, Trento, 16-17 October 2014.

<sup>317</sup> The term “prison complex” is used by Sarah Lambie, n.228.

<sup>318</sup> See e.g. Marella, n.84; Butler, n.32; Cohen, n.7; Douglas Routh and others, ‘Transgender Inmates in Prisons: A Review of Applicable Statutes and Policies’ (2015), 61 *International Journal of Offender Therapy and Comparative Criminology* 6, 1-22. In relation to the US, Routh and others observed that only a number of states provide policies dealing with transgender offenders’ classification, while specific guidance to deal with transgender inmates’ healthcare is lacking.

This thesis engages in a queer socio-legal analysis as it will consider whether human rights categories are inherently essentialist, thus in need of being “queered.”<sup>319</sup> The problematisation of the law on prison as a site of promotion of coherent sexualities based on a heteronormative sex hierarchy is indeed examined in light of the potentials of the human rights discourse as an exogenous factor of change to the prison complex.

The doctrinal research makes use of primary sources: legislation and case law from hard copy stored at Northumbria and University of Florence libraries, and electronic materials available via Westlaw, Lexis Nexis, Heinonline, HUDOC. The study also considers secondary sources from library collections, inter-library loans, official websites,<sup>320</sup> and NGO websites.<sup>321</sup> It maintains a doctrinal component in the sense that the law is presented as a system, where arguments are derived from the sources mentioned above.<sup>322</sup>

The necessity of interdisciplinarity beyond the study of “black letter” law to understand a phenomenon more thoroughly characterises also the application of comparative analysis as a method that aims to reveal the cultural societal foundations of the said phenomenon. Legrand considers the comparatist as an interpreter of not only the “directly visible aspects of legal phenomena but also their sense.”<sup>323</sup>

This research undertakes a comparative methodology<sup>324</sup> that seeks to find similarities and differences not only in terms of internalisation of human rights norms within legal sources, but also regarding prisoners’ experiences and cultural understandings of sexuality and gender identities and expressions within the space

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<sup>319</sup> On the notion of coherent sexualities in the legal discourse, see Stychin, n.61. The concept of sex hierarchy is developed by Gayle Rubin in *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, while the critique to the essentialist characteristics of human rights has been addressed by feminist theory and LGBT studies: see e.g. Tahmindjis, n.161. Queer theory has been applied to the human rights discourse in order to highlight the centrality of sexuality as an organising principle of international law, yet it has been developed with a tendency to consider sexual minorities, trans and gender non-conforming subjects as other-ed in comparison with the heterosexual cisgender individual. Thus, “queering” becomes a method of critique towards emancipation. See Diane Otto, ‘Embracing Queer Curiosity’ in Diane Otto ed., *Queering International Law – Possibilities, Alliances, Complicities, Risks* (1<sup>st</sup> ed., Routledge 2017). However, some do not believe that there is any potential for human rights to be queered in the aim of acknowledging sexual and gender diversity, as they remain based on a Euro-American interpretation of same-sex desire, which finds expression in an LGBT rights framework that “constitutes an intervention, not a liberation.” see Kapur, n.105. Certainly, a queer critique challenges the notion that LGBT rights can be fully achieved only by granting equal rights, as they only represent a partial response to forms of discrimination and violence based on sexual and gender diversity. See Anthony Langlois, ‘Curiosity, Paradox and Dissatisfaction: Queer Analyses of Human Rights (Review Article)’ (2018), 47 *Millennium: Journal of International Studies* 1, 153-165.

<sup>320</sup> For example, HM Prison Service. Public Sector Prison, at [<https://www.gov.uk/government/organisations/hm-prison-service>], accessed 22 February 2019; Parliament UK, at [<https://www.parliament.uk/>], accessed 22 February 2019; Ministero della Giustizia (Italian Ministry of Justice), at [<https://www.giustizia.it/giustizia/it/homepage.page?sessionId=RZO--NLtX6zQDiYguAndynl2>], accessed 22 February 2019; Garante nazionale dei diritti delle persone detenute o private della libertà personale (National Ombudsman on the Rights of Persons Deprived of their Liberty), at [<http://www.garantenazionaleprivatiliberta.it/gnpl/>], accessed 22 February 2019; Independent Expert on sexual orientation and gender identity, at [<https://www.ohchr.org/en/issues/sexualorientationgender/pages/index.aspx>], last accessed 22 February 2019; Council of Europe, at [<https://www.coe.int/en/web/portal>], accessed 22 February 2019.

<sup>321</sup> For example, Antigone (Association “for the rights and guarantees in the penal system”) [<http://www.antigone.it/>], last accessed 9 December 2019; Howard League for Penal Reform, at [<https://howardleague.org/>], accessed 9 December 2019.

<sup>322</sup> Terry Hutchinson, ‘Doctrinal Research: Researching the Jury’, in Dawn Watkins, Mandy Burton eds., *Research Methods in Law* (Routledge 2018), at 14.

<sup>323</sup> Pierre Legrand, ‘Le droit comparé’ (2000), 52 *Revue internationale de droit comparé* 1, at 15.

<sup>324</sup> The study embraces a comprehensive view of comparative analysis as something more than a formalistic method, but as an interpretative instrument deeply linked with a theory and that enhances interdisciplinarity. See Legrand, P. *How to compare now\** (1996), 16 *Legal Studies* 2, at 123.

where they are confined. The concept of difference derives once more from Legrand's theory, which proposes that legal transplants of legal concepts is never fully possible, as a jurisdiction has cultural roots besides formal written rules.<sup>325</sup> In this perspective, the study takes a different epistemological route by interrogating whether the human rights discourse can create moments of communication between legal frameworks that are capable of creating a connection between culturally diverse jurisdictions. As Graziadei observes, culture is a complex concept and legal transplants involve multiple factors.<sup>326</sup>

The wide spectrum of sexualities and gender identities, particularly as represented in human rights theory and queer theory<sup>327</sup> and as emerging from the interviews conducted with selected participants, reflects an "actional" approach to comparison, where a social phenomenon is assessed in relation to individual actors or agents.<sup>328</sup> As will be exposed in the illustration of the data analysis stage, the language used by the research participants, as well as the legal texts on prison applied in England and Italy, will be compared hermeneutically, that is by verifying whether words, definitions and stories are signifiers of deeper phenomena.<sup>329</sup>

In this chapter, I seek to further detail the process toward building up my research methodology, including the challenges that I have encountered in preparing my fieldwork, as well as the unforeseen changes faced during the data collection phase.

### 3.2 Problem formulation: the influence and challenges of a human rights discourse on sexualities and gender identity in the context of imprisonment

This thesis refers to studies stipulating that the prison normative paradigm is based on a regulatory power leading to the strict surveillance of expression of sexualities that is rooted in a general sex prohibition rule inside prison.<sup>330</sup> Concurrently, subjects who do not conform to sexual typicality struggle to be included within the system, to the point of invisibility or, in the most serious cases, elimination.<sup>331</sup>

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<sup>325</sup> Geoffrey Samuel, 'Comparative Law and Its Methodology', in Dawn Watkins, Mandy Burton eds., *Research Methods in Law* (Routledge 2018), at 133. Differently from Legrand, other comparatists such as Zweigert and Kotz believe that comparison can only be effective if the researcher looks for similarities between legal concepts in different jurisdictions, as the emphasis should be on the legal institute function, and only concepts that exercise the same function can be compared.

<sup>326</sup> Michele Graziadei, 'Comparative Law as the Study of Transplants and Receptions', in Mathias Reimann and Reinhard Zimmermann eds., *The Oxford Handbook of Comparative Law* (Oxford University Press 2006).

<sup>327</sup> See e.g. Jagose, n.15.

<sup>328</sup> Geoffrey, *Comparative Law and Its Methodology*, 141.

<sup>329</sup> *Ibid.*, at 139.

<sup>330</sup> See for example Foucault, n.5; Stevens, n.316; Wooden and Parker, n.226; Ball, n.48; Dalton, n.11; Blair Woods, n.11; Buist and Lenning, n.11.

<sup>331</sup> See e.g. Leah Drakeford, 'Correctional Policy and Attempted Suicide among Transgender Individuals' (2018), 24 *Journal of Correctional Health Care* 2, 171-182. See also news in the media: 'Transgender prisoner found hanged 'after quitting suicide pact'', BBC News, 19 December 2017, at [<https://www.bbc.com/news/uk-england-south-yorkshire-42415065>], accessed 9 December 2019; 'Transgender woman in male prison 'nightmare' on hunger strike', *The Guardian*, 28 January 2018, at [<https://www.theguardian.com/society/2018/jan/27/marie-dean-trans-prisoner-male-prison-hunger-strike>], accessed 9 December 2019; 'Trans si suicida nel bagno del carcere maschile di Udine', *Udinetoday.it*, 2 August 2018, at



The comparative analysis of the internalisation of international human rights norms in two European jurisdictions, England and Italy, preliminarily acknowledges the gender binary division between male and female of national penal estates as a common denominator of both countries' penitentiary system, which have repercussions on prisoners' sexuality and relationships, and on their capability to freely express their gender identity.

On the other hand, in the female penal institutions visited, same-sex relationships tended to be more accepted, though episodes of homophobia may arise from certain groups of prisoners, or from prison staff.<sup>332</sup>

Both female and male prisoners shall experience their sexuality (particularly in terms of sexual activity) "in the shadows," since they are sanctioned when prison staff see prisoners engaging into sexual acts, as mirrored by the prohibition of sex in prison, which can ultimately be only between persons of the same sex.

The question is to what the extent the human rights discourse on sexuality and imprisonment supports normative coherence, or offers new opportunities to deconstruct the essentialist heteronormative interpretation of sexuality, gender and identity. This problem is twofold: it is necessary to interrogate whether human rights law is essentialist and heteronormative in its foundations; and whether the internalisation of human rights in national settings such as England and Italy, has merely reiterated heteronormative assumptions on gender and sexuality, or on the contrary if the human rights discourse can represent an exogenous factor of "queerness" within the prison complex.

### 3.3 Identifying research participants: the ever changing definitions of queer

Initially, the research's qualitative method aimed at exploring the emotional impact of the prison experience for inmates who identify as lesbian, homosexual, bisexual or transgender, or have had intimate contacts with persons of the same sex.<sup>333</sup> However, while undertaking the interviews, I quickly realized that the acronym

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[<http://www.udinetoday.it/cronaca/suicidio-detenuta-trans-lgbt-carcere-maschile-via-spalato-udine.html>], accessed 9 December 2019.

<sup>332</sup> These findings confirmed data analysed in the literature on women in prison. See Chapter 2, S. 2.10.

<sup>333</sup> LGBT research has explored over the years the challenges of giving a definition of sexual orientation and gender identity. Descriptions developed during the 1980s and 1990s, when early studies on the LGBT population started developing after homosexuality was removed as mental disorder from the *American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders* in 1973, presented an "underlined conceptual confusion". Through the years, notions of sexual orientation relied on different aspects, such as sexual identity (mainly via participants' self-identification), behaviour (i.e. undertaking of same-sex sexual acts) and sexual desire (i.e. reporting of same-sex romantic feelings, desires or fantasies). Ultimately, a number of quantitative studies aimed to consider all three dimensions to select a representative sample. See Cheryl Parks, Tonda Hughes, Lisa Werkmeister-Rozas, 'Defining Sexual Identity and Sexual Orientation in Research with Lesbians, Gay Men and Bisexuals', in William Meezan and James I. Martin, *Handbook of Research with Lesbian, Gay, Bisexual and Transgender Populations* (Routledge 2009), 71-99. Instead, transgender identities were constructed more often around self-experiences of gender variance. See James Martin and Anthony D'Augelli, 'Timed Lives – Cohort and Period Effects in Research on Sexual Orientation and Gender Identity', in William Meezan and James I. Martin, *Handbook of Research with Lesbian, Gay, Bisexual and Transgender Populations* (Routledge 2009), 190–207. This research initially included two of the abovementioned dimensions (identity and behaviour) to sample participants; nevertheless, due to methodological challenges and institutional barriers, the recruitment process ended up relying on self-identification of sexual orientation and gender identity only.

LGBT<sup>334</sup> was not adequate to capture the spectrum of expressions used by participants to self-identify their sexual orientation or gender identity.<sup>335</sup> In some respect, this terminology turned out to be too limitative, particularly as the interviewees could attribute different meanings, or interpretations, to notions such as “gay,” “lesbian” or “transsexual.”<sup>336</sup> My position as white, relatively wealthy, gay male researcher influenced the preliminary design to categorise participants, whereas definitions common in academic debates or that are becoming more prominent in academic debate, went completely overlooked by interviewees.<sup>337</sup> As observed by other researchers who engaged in fieldwork with the LGBTQ community, the positioning of the researcher, and their belonging to the group under study, can influence the relationship between the researcher and the researched, and possibly determine different outcomes.<sup>338</sup> Furthermore, specific attention shall be paid to avoid simplistic conceptualisations of sexualities and identities.<sup>339</sup>

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<sup>334</sup> The acronym commonly stays for lesbian, gay, bisexual and transgender. Other letters or symbols have been added to make it more inclusive, such as in LGBTQ, where Q signifies queer as an umbrella term, LGBTI, where the ‘I’ stands for “intersex” or LGBT+.

<sup>335</sup> The fluidity and instability of categories representing sexual and gender identity reflects the queer theory stance on resisting gay, lesbian, bisexual, trans, intersex or other categories that risk becoming too rigid, while producing exclusionary practices among different minority groupings. Although queer theory still values plural identities, it also tends to deconstruct and continually re-discuss them, differently from gay and lesbian studies, which maintained a more structured distinction among identities, particularly gay and lesbian. These were challenged by the emergence and acknowledgement of other minority identities, such as bisexual and transgender identities, while sexuality was contextualised also in relation to other previously overlooked categorizations based on race or ethnicity. Queer theory also analyses the role of sexuality within power relations, drawing from the social constructionist critique of sexuality as an instrument to impose power dynamics of oppression. However, the postmodern turn of queer theory goes beyond the negative characterisation of the relationship of power and sexuality to investigate the possibility that multiple sexualities become a source of pleasure rather than oppression. This approach is reflected in the narratives of participants in this study. They played with the concept of sexual identities and gender and highlighted the multiple effects of power dynamics, which lead both to violence, oppression and vulnerability, and to unexpected positive relational experiences, despite the highly problematic normative framework of the prison complex. For further details on the various streams of sexuality studies, see e.g. Beasley, n.40; Jagose, n.15.

<sup>336</sup> In the interviews I collected, participants usually preferred to describe themselves as “transsexuals” rather than “transgender.”

<sup>337</sup> For instance, the acronym AMAB (assigned male at birth) or AFAB (assigned female at birth) were completely ignored, while the term “transvestite” has come up in some interviews, though it is generally considered offensive to refer to a transgender person in this way. I was anyway aware of the fact that the same notion of “categorising” sexualities and gender is heavily criticised by queer theory and certain feminist theory. See e.g. Michael Connors Jackman, *The Trouble with Fieldwork: Queering Methodologies*, in Nash C. and Browne K., *Queer Methods and Methodologies* (Routledge 2010), 113-128.

<sup>338</sup> Lewin and Leap had however observed how sexual identity management during fieldwork is somehow easier to gay and lesbian researchers who have already experienced the process of “filtering their personal lives for different audiences”, whereas heterosexual fieldworkers have often to be taught how to do it. See Jackman, *The Trouble with Fieldwork: Queering Methodologies*, *ibid.* Will Roscoe (1996) also observes that identity politics can shape academic research, for example in the sense that anthropologists contribute to making culture while they represent it. Still, Fielding argues that shared characteristics between researcher and participants “do not automatically make for rapport.” Nigel Fielding, ‘Working in hostile environments’, in Seale, Gobo, Gubrium and Silverman eds., *Qualitative Research Practice* (SAGE, 2004). Nash questions the relationship between the insider and the outsider in the field, noticing that a researcher’s position is often characterised by instability, thus their position can change, or may need to be renegotiated, even within a single interview. Catherine Nash, ‘Queer Conversations: Old-time Lesbians, Transmen and the Politics of Queer Research’, in Nash and Browne eds., *Queer Methods and Methodologies: Intersecting Queer Theories and Social Science Research* (Taylor & Francis Group, 2010).

<sup>339</sup> For example, Swindell and Pryce criticise how research on lesbian populations lack complex models to encompass the behavioural problems affecting some lesbian experiences within the group. See Marian Swindell and Jo Pryce, ‘Self-Disclosure Stress: Trauma as an Example of an Intervening Variable in Research with Lesbian Women’ (2003), 15 *Journal of Gay & Lesbian Social Services* 1-2, 95-108. On the need for complexity when doing research in this field, see also

Therefore, the term queer is probably more fitting in attempting to capture such fluidity. Nevertheless, the question of what is an exhaustive definition of “queer” remains unanswered. The term “queer” has assumed many different meanings through time. Initially adopted to describe homosexuality or effeminate individuals, it was later appropriated by activists to identify a type of policy aimed at provoking the status quo and celebrate difference rather than integration.<sup>340</sup> The term “queer” presents an inherent flexibility that Teresa De Lauretis, when introducing the notion of “queer theory” for the first time, intended to capitalise to include intersectional elements, such as gender, race or class, deepening and re-positioning the debate on perversion and preference absorbing gay and lesbian studies.<sup>341</sup>

In this research, queer will be employed in different ways. It can be mentioned as an umbrella term to encompass the diverse sexual and gender spectrum, including and going beyond the acronym LGBT. In *Fear of a Queer Planet*, Michael Warner notices the difficulty in describing the population whose interests are the object of queer politics,<sup>342</sup> but this instability creates possibility in the examination of research findings that hold the potential to avoid formulaic findings.<sup>343</sup>

Queer will also be adopted to describe a form of disorientation created by a body inside a space,<sup>344</sup> for instance, the displacing effect caused by a transgender individual inside the prison setting. In this sense, queer can allude to de-constructing, challenging, problematising power structures in connection with sexuality and gender expressions. Indeed, as maintained by Jagose channelling Simon Watney, “queer” is not simply the successor of gay, homosexual or other words describing same-sex desire, but “a consequence of the constructionist problematising of any allegedly universal term.”<sup>345</sup> Therefore, even when queer will be mentioned as a comprehensive term, its complexity, grounded in discourses of power and resistance, will be taken into account, as well as its historical significance.<sup>346</sup>

In the context of imprisonment, Warner’s reference to queer as a vehicle to facilitate the emergence of normalising practices that support sites of violence more than intolerant behaviours<sup>347</sup> is also relevant. Normalising strategies and mechanisms of surveillance over intimacy and sexuality characterises the prison environment and fuels heteronormative and gender binary logics.<sup>348</sup>

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William Meezan and James I Martin, ‘Exploring Current Themes in Research on Gay, Lesbian, Bisexual and Transgender Populations’ (2003), 15 *Journal of Gay & Lesbian Social Services* 1-2, 1-14.

<sup>340</sup> Jagose, n.15; April S Callis, ‘Playing with Butler and Foucault: Bisexuality and Queer Theory’ (2009), 9 *Journal of Bisexuality*, 213-233. De Lauretis, n.45.

<sup>341</sup> Jagose, n.35.

<sup>342</sup> Warner, n.15.

<sup>343</sup> Jackman, n.337.

<sup>344</sup> Similarly to one of Ahmed’s uses of the term “queer” in *Queer Phenomenology*.

<sup>345</sup> Jagose, n.15, at 74.

<sup>346</sup> *Ibid*, 76-78.

<sup>347</sup> Warner, n.15.

<sup>348</sup> John Riley, ‘The pains of imprisonment: Exploring a classic text with contemporary authors’ (2002), 13 *Journal of Criminal Justice Education* 2, 443-461; Crewe, n.189. Kunzel, n.194. The practice of normalisation has also influenced the way sexualities in places of detention has been approached by the literature in past years: Sykes’ famous description of the pains of imprisonment included sexual deprivation, though he concluded that homosexuality is a perversion caused by the lack of heterosexual intercourse. Nowadays, these arguments have been challenged, as the understanding of sexual

Finally, queer can also refer in the text to non-normative sexual practices.<sup>349</sup> Even in this case, the spatial, social and historical context where the word queer is utilised will be considered, as queer remains a concept characterised by multiple layers and orientations.<sup>350</sup>

Even in cases where the acronym LGBTQ is used to identify lesbian, gay, bisexual and transgender people, the different meanings that these definitions have for different individuals in specific contexts will be considered. By “queering” the groups characterising this acronym, the ever evolving foundations of this abbreviation are acknowledged.

The reflection on appropriate terminology to represent the research participants and the challenges in properly identifying forms of sexualities and identities inside the prison context concerns also the analysis of international human rights law on the topic. International bodies make reference to LGBT, LGBTI or SOGI (sexual orientation and gender identity). An attempt to determine clear definitions is represented by the Yogyakarta Principles, and their recent periodic review,<sup>351</sup> though the international human rights discourse still struggles to embrace the multiplicity of identities that originate from the interconnections between sexuality and gender, and to disrupt heteronormativity and essentialism instead of perpetuating exclusionary practices in relation to more unstable identities.<sup>352</sup>

Considering the development of international norms as part of a “life cycle”, definitional issues in the human rights discourse acquire relevance in relation to the internalisation of human rights in domestic settings. For instance, the approach to definitions of sexual orientation and gender identity in national prison laws and policies represents an important issue when it comes to allocating vulnerable categories such as queer inmates.

Following Stephen Whittle, this study will use the term trans or transgender rather than transsexual, unless my participants or the examined sources explicitly mention the latter.<sup>353</sup> Trans will be used as an umbrella notion to encompass all people who do not perceive their gender identity as the one corresponding to the sex assigned at birth.<sup>354</sup> The term transgender refers to each person who lives or wishes to live their life performing a gender

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orientation has moved beyond the association of homosexuality with deviance. Even Hensley and others referred to Sykes to describe same-sex relationships in prison as a form of situational homosexuality, dictated by the fact of being imprisoned and surrounded only by persons of the same sex. It is perhaps time to queer academic approaches to this topic: for instance, these studies did not consider the possibility that some members of the prison populations could come out as a result of the prison experience, or that such re-positioning of the self could not necessarily be temporary.

<sup>349</sup> Jagose, n.15; Ahmed, n.29.

<sup>350</sup> Ahmed *ibid*, at 161.

<sup>351</sup> The YP definitions of sexual orientation and gender identity, gender expression and sex characteristics will be examined in Chapter 4.

<sup>352</sup> On the analysis of norms on SOGI in international human rights law, in Chapter 4 their evolution will be examined in light of Sinnemore and Fikkink’s international norms dynamics approach, according to which norms follow a life cycle from emergence to cascade to internalisation. See Finnemore & Sikkink, n.148. See also Baisley, n.112. On the instability of SOGI definitions, see e.g. Butler, n.32; Stychin, n.61. The thesis aims to assess whether the international norms dynamics theory presents some shortfalls and whether it can be applied to SOGI in places of detention.

<sup>353</sup> Whittle, n.16, at xxii – xxiii. These definitions are used only in terms of clarification in order to establish a common ground of understanding, as any definitions cannot but be arbitrary and exclusionary of certain identities and experiences.

<sup>354</sup> Some people’s gender is situational, and can change through time.

role that does not correspond to the sex assigned at birth.<sup>355</sup> Transsexuality relates to those people who underwent, are undergoing or desires to undergo a gender affirming process.<sup>356</sup> It is also argued that being transgender means to go across the boundaries of gender towards another gender.

Transsexual is a term which has been utilised frequently by transgender participants to this study (particularly in Italy). It can be used to identify a person who was born a woman but identifies as man, or vice versa. FTM and MTF are used to define people who have undergone medical treatments to change their biological sex (Female to Male, or Male to Female) to align it with their preferred gender.<sup>357</sup>

Finally, intersectionality constituted an important factor to contextualise participants' self-identification. Class, gender and nationality all contributed to de-stabilise conventional definitions of gender and sexuality. The study does not explore thoroughly each one of these characteristics, but their impact on prisoners' relationships will be flagged up when pertinent.

### 3.4 Sampling participants: how to identify queer people as a vulnerable category in the prison setting

People have been selected as participants not to identify a sample that is statistically representative of all imprisoned LGBTQ persons, but to ensure diversity of coverage across the main variables under analysis.

Initially, the project aimed at including both convicted adult gay male, lesbian female, bisexual and transgender prisoners who have declared their sexual orientation or gender identity, and convicted adults who have entertained sexual acts with persons of the same sex or were still "in the closet," thus belonging to the general prison population and not in a special section of the penal institution.

These individuals are considered a vulnerable group to research, particularly considering that the interviews covered sensitive topics such as sexual habits or the perils of transitioning inside prison. The literature presents various definitions of vulnerable populations; this study refers to Liamputtong's conceptualisation that reads:

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<sup>355</sup> See also Stanislaw Bielous, 'Trans Women in Incarceration: Housing, Healthcare, and Humanity' (2018), 6 *Themis: Research Journal of Justice Studies and Forensic Science* 1, 1-23. Some transgender people identify as females, others as males, and yet others as neither male nor female. Therefore, transgender individuals may express themselves outside the gender binary boundaries of societies, but they do not necessarily undergo surgery to align their sex with their gender identity.

<sup>356</sup> Bielous, id. Transsexual individuals may or may not undergo medical treatment through hormone therapy or sex reassignment surgery to have their sexual traits align with their perceived gender identity. They can be either pre-transition/operative, transitioning/in the process of hormonal and surgical sex reassignment, or post-transition/operative.

<sup>357</sup> Julie L Nagoshi and Stephanie Brzuzy, 'Transgender Theory: Embodying Research and Practice' (2010), 25 *Journal of Women and Social Work* 4, 431-443; Taylor Flinn, 'Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality' (2001), 101 *Columbia Law Review*, 392. See also ILGA-Europe Glossary, at [[https://ilga-europe.org/sites/default/files/ilga-europe\\_glossary\\_final\\_170714\\_www.pdf](https://ilga-europe.org/sites/default/files/ilga-europe_glossary_final_170714_www.pdf)], accessed 16 September 2018. Some trans people prefer to use the terms AMAB (assigned male at birth) and AFAB (assigned female at birth), but my participants were not familiar with these expressions.

*Vulnerable People [are] individuals who are marginalised and discriminated (sic) in society due to their social positions based on class, ethnicity, gender, age, illness, disability and sexual preferences. Often, they are difficult to reach and require special considerations when they are involved in research. The term is also used to refer to people who are difficult to access in society.*<sup>358</sup>

The sampling process should have been accomplished by distributing an information sheet and a questionnaire to the whole prison population, or at least to some pre-selected sections agreed with the prison staff. Through the questionnaire, individuals interested in participating would have had the possibility to self-identify according to their sexual orientation or gender identity.<sup>359</sup> In both jurisdictions, this initial plan had to be reviewed after negotiations with prison staff and rehabilitation social workers for each penal establishment.

The participants have been selected from two establishments located in England (Prison UK-1 and UK-2), and three prisons in Italy (Prison ITA-3, ITA-4 and ITA-5). The sample size consists of 21 participants (eight in England and 13 in Italy).<sup>360</sup>

At UK-1 and UK-2, I could not distribute the information sheet to all prison residents, as it was considered not feasible for the prison staff to handle, in light of the high number of prisoners. More specifically, at UK-1 the Head of Safeguarding believed it too risky for men hosted in the general prison population wings to self-identify by completing the questionnaire, as there are virtually no cases of “out” homosexuals or men who have sex with men (MSM) who are not hosted in the vulnerable population (VP) section, thus exposing them to potential threat, discrimination or violence. At UK-2, the research was publicised by showing an advertisement on screens placed in selected wings, and interested participants were asked to approach the Equalities staff coordinator.

In the male prisons I visited in Italy, it was not possible to sample potential participants among the general prison population. MTF transsexual inmates were allocated to a special section at ITA-1. Homosexual men who declared their sexual orientation to the prison staff had been initially placed in the same section as MTF transsexual people at ITA-1, but were subsequently moved to a special section in the ITA-2 complex due to cohabitation problems between the two groups.<sup>361</sup>

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<sup>358</sup> Pranee Liamputtong, *Researching the Vulnerable: A Guide to Sensitive Research Methods* (SAGE Publishing 2007).

<sup>359</sup> Participants were given a list of definition among which they could choose, including the possibility to define themselves otherwise. Although this approach recalls Gay and Lesbian Studies based on sexuality difference, with the risk of “essentialising” identities, this method was necessary to make an initial screening of potential participants; additionally, it was necessary to include a structured selection method that adopted terms used also by the National Prison Services of each jurisdiction, in order to get access to participants. Nonetheless, questions on self-identification were used during the interview as a starting point of conversation, and were explored – and often challenged – in detail by the participants themselves. It thus became an opportunity to enact a “queering” exercise within the data collection process.

<sup>360</sup> In order to obtain the authorisation to interview my participants in the UK, the HMPPS required me to anonymise not only the participants’ names, but also the prison location. A similar condition was not requested by the Italian Prison Service. To ensure that the comparison between the two jurisdictions was held on common grounds, I decided to anonymise also the location of the Italian prisons I visited. However, I must say that I have found this condition unnecessary to guarantee the safety of my participants, and prevented me from including important information regarding the geographical context where these penal estates are located, and many of the participants come from, which were of great relevance to fully understand some of the interviewees’ opinions, experiences and relational dynamics.

<sup>361</sup> This episode is explored in the fieldwork findings chapter, S. 6.2.4.

The prison rehabilitation worker who acted as my Point of Contact believed that there were no closeted homosexuals in either prison, as either they would come out to the staff at some point, or the prison personnel “would have known”: when I asked him in what ways, he explained that homosexuals are “recognisable” and repeated that “you would know,” hinting at the fact that they supposedly act in a feminine manner. The possible presence of prisoners who self-identify with a gender different from their biological sex, but are not transsexual, was not acknowledged by my Point of Contact.

Contrariwise, in the female establishment I accessed in Italy (ITA-5), distribution of questionnaires to the whole prison population was not possible due to the considerable number of prisoners living in the complex. Consequently, we agreed with my Point of Contact there (a rehabilitation social worker) that she would organise a preliminary meeting with prisoners under her supervision where she was already aware of their identification as lesbians, or of the fact that they had same-sex relationships.

Therefore, both in female and male prisons I could not include closeted subjects in my final sample. The behavioural component of sexuality and gender had to be left aside in favour of sexual and gender identity sampling.<sup>362</sup>

### 3.5 Research design: reasons to adopt a qualitative approach

The research was originally designed to complete 15 semi-structured interviews in three penal institutions in Italy and 15 semi-structured interviews in two prisons in England.

Studies on prisoners’ sexuality and gender expressions, particularly focusing on individuals who self-identify as homosexual, lesbian, bisexual or transgender, or use different definitions to identify themselves that can be referred to under the umbrella term “queer”, are quite rare in the literature.

Sociological research on sexuality, gender identity and sexual minorities has stressed the difficulty in getting reliable measurements concerning the LGBT population, in terms of statistical samples, discrimination rates and number of LGBT people as compared to the general population.<sup>363</sup> In the context of prison, public authorities and prisoners’ rights advocates have underlined the difficulty in collecting data in relation to these

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<sup>362</sup> Although limiting, as the experiences of less visible sexual and gender minorities are excluded, the contribution of participants who are already “out” help in focusing on issues concerning sexuality and gender that are connected to the social context and the way it informs their expression. See Parks and others, n.333, at 71-99. Identification and access to participants for research are among the most serious obstacles to researchers in LGBT studies: Sullivan G and Losberg W, ‘A Study of Sampling in Research in the Field of Lesbian and Gay Studies’ (2003), 15 *Journal of Gay and Lesbian Social Services* 1-2, 147-162.

<sup>363</sup> Peter Aspinall and Lavinia Mittall, ‘Operationalising ‘sexual orientation’ in routine data collection and equality monitoring in the UK’ (2007), 10 *Culture, Health and Sexuality* 1; Scottish Government: Collecting Equality Information Series Guidance note on asking questions on: sexual orientation, at [<http://www.gov.scot/Resource/0039/00393545.pdf>], accessed 9 December 2019; The GenIUSS Group, *Best Practices for Asking Questions to Identify Transgender and Other Gender Minority Respondents on Population-Based Surveys*, J.L. Herman Ed. (Los Angeles, CA: The Williams Institute 2014).

characteristics. It is not clear how many homosexual, bisexual and lesbian people are hosted in English and Italian prisons,<sup>364</sup> whereas more data are available regarding transgender inmates.<sup>365</sup> Still, the statistics on the transgender prison population probably do not reflect the exact amount of trans inmates who are serving their sentence in confinement, as the instruments at our disposal do not usually allow collection of data on those trans people or gender non-conforming individuals who do not undergo surgical treatment, and who are more likely allocated with the general population according to the sex as indicated on their birth certificate.<sup>366</sup>

Besides attempts of collecting quantitative data to identify the LGBT population in prison, or to verify how many inmates would engage into sexual activity during imprisonment,<sup>367</sup> little research has tried analysing the emotional and subjective experiences of these vulnerable categories in this context.

Qualitative research on this topic has recently received more attention, for various reasons, such as the increasing overcrowding of prison establishments, and the strengthening of penal policies especially focusing on harsher sentencing and ensuring security through risk assessment strategies.<sup>368</sup> These phenomena stretch to the limits the internal dynamics among actors of the penal institution, particularly prisoners and staff.

The queer/trans analysis of prison laws and regulations, and their impact on the prison population, contributes to shedding light on the otherwise hidden prison environment. Prison studies more commonly focus on the sexual conducts of prisoners,<sup>369</sup> whereas they risk overlooking the gendered supra-structures that influence relationships inside prison, not only in terms of sexual activity, but also in light of affectionate and intimate bounds that can arise during imprisonment, or on the contrary of the homophobic and transphobic episodes occurring within penal institutions.

Feminisms and queer theory present some common strategies relevant to the design of a qualitative method concerning this topic. Critiquing power dynamics in society, hetero-patriarchy and hierarchy based on constructed genders and sexualities is typical of both theories, and involves also the scrutiny of the impact that laws and regulations have in the definition of identities. The qualitative approach allows exploration of how

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<sup>364</sup> Estimates are available for England and Wales in the Ministry of Justice reports: see e.g. National Offender Management Service (now HMPPS) Equalities Annual Report 2015-2016 (Statistics Bulletin 24 November 2016), at [<https://www.gov.uk/government/statistics/noms-annual-offender-equalities-report-2015-to-2016>], accessed 9 December 2019; or the annual report on prison conditions issued by the Italian Ombudsman on the rights of persons deprived of their liberty to the Italian Parliament: Garante Nazionale Relazione dei diritti delle persone al Parlamento detenute o private della libertà personale, Relazione al Parlamento 2018 (Ombudsman for the rights of persons detained or deprived of their liberty, Report to Parliament 2018), at [<http://www.garantenazionaleprivatiliberta.it/gnpl/resources/cms/documents/b374e028773d7d20039aae1eb89599bb.pdf>], accessed 9 December 2019; Associazione Antigone, *Torna il carcere: XIII rapporto sulle condizioni di detenzione*, available at [<http://www.antigone.it/tredicesimo-rapporto-sulle-condizioni-di-detenzione/>], accessed 9 December 2019.

<sup>365</sup> Equalities Annual Report 2015 / 2016, *ibid*; Lorenzetti, n.91.

<sup>366</sup> Poole and others, n.270; Alex Sharpe, 'Foxes in the Henhouse: Putting the Trans Women Prison Debate in Perspective', *Inherently Human*, 11 September 2018, at [<https://inherentlyhuman.wordpress.com/2018/09/11/foxes-in-the-henhouse-putting-the-trans-women-prison-debate-in-perspective/>], accessed 2 March 2020.

<sup>367</sup> Stevens, n.316.

<sup>368</sup> Yvonne Jewkes and Serena Wright, 'Researching the Prison', in Yvonne Jewkes, Jamie Bennett and Ben Crewe eds., *Handbook on Prisons* (II ed., Routledge New York 2016), at 659 - 676; Crewe, n.189; Ben Crewe, *The Prisoner Society- Power, Adaptation and Social Life in an English Prison* (Oxford University Press 2009).

<sup>369</sup> Stevens, n.316; Hensley, n.198.



bodies orientate themselves in relation to other bodies in a given space informed on inherent gendered and essentialist paradigms, and helps in determining the outcomes of these encounters between bodies, spaces, and regulatory settings.

Feminist and queer theory are used to reflect analytically on materiality of the bodies, their orientation in time and space, as well as their contribution into establishing a multiplicity of so far overlooked identities.<sup>370</sup>

### 3.5.1 The purpose of using interviews as a qualitative method

The research uses semi-structured interviews to cover a range of topics relevant to queer prisoners' experience, yet leaving room for participants to digress. Thus, I had the chance to cover all topics of discussion, while the interviewee could explore, explain, and talk about other issues interesting to them. Participants' subjective memories create a narrative that challenges prison paradigms through a dialogical interaction, and problematise legal and policy practices through the analysis of participants' stories.<sup>371</sup>

This "guided freedom" is designed to balance the researcher-participant relationship.<sup>372</sup> Reciprocity in dialogue and the analysis of personal experience and accounts aim to create a model of collaboration between researcher and participants that can dismantle the traditional divide between the two.<sup>373</sup> It ultimately contributes to the idea that the interviewees are "constructor[s] of knowledge together with the interviewer,"<sup>374</sup> thus making the interview process a focal point of the research development. In addition, the qualitative method better contributes to considering the emotional impact of the prison experience in a way that would not be as effective by limiting the study to black-letter law analysis.<sup>375</sup>

Feminist research also highlights the benefits of subjectivity in using interviews as a method that facilitates reflexivity, criticality and analysis of experience.<sup>376</sup> Distancing from the notion that knowledge is objective, scientific research can be conducted without relying on a conceptualisation of objectivity which is inherently

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<sup>370</sup> Ahmed, n.29; see also Diana Fuss, *Essentially Speaking: Feminism, Nature and Difference* (New York: Routledge 1989), on the relationships among individuals, and between the researcher and the researched. Corie Hammers and Alan D Brown III, 'Towards a feminist-queer alliance: a paradigmatic shift in the research process' (2004), 18 *Social Epistemology* 1, 85 – 101.

<sup>371</sup> See Liamputtong, n.358; Alison Rooke, 'Queer in the Field on Emotions, Temporality and Performativity in Ethnography', in Catherine Nash and Kath Browne, *Queer Methods and Methodologies: Intersecting Queer Theories and Social Science Research* (Taylor & Francis Group, 2010).

<sup>372</sup> Alan Morris, *A practical Introduction to In-Depth Interviewing* (Sage 2015), 9-12.

<sup>373</sup> Claire Renzetti, 'Confessions of a Reformed Positivist: Feminist Participatory Research as Good Social Science', in M.D. Schwartz ed., *Researching Sexual Violence Against Women: Methodological And Personal Perspectives*, (Thousand Oaks, CA: Sage Publications 1997), 131-143.

<sup>374</sup> Jaber F. Gubrium & James A. Holstein, *Postmodern Interviewing*, Gubrium and Holstein eds. (Sage 2003), at 68.

<sup>375</sup> See e.g. Alison Liebling, 'Postscript: Integrity and Emotion in Prisons Research' (2014), 20 *Qualitative Inquiry* 4, 481-486. On the reciprocity of the interview experience, see also Anne Galletta, *Mastering the Semi-Structured Interview and Beyond*, (New York University Press 2013), at 24, 45-72. In Fuss, n.370, the relationships among individuals, and between the researcher and the researched are explored.

<sup>376</sup> Hammers and Brown III, n.370, at 100. On the prominence of interviewing in feminist research, see also Celia Kitzinger, 'Feminist approaches', in Clive Seale, Giampietro Gobo, Jaber Gubrium, David Silverman eds., *Qualitative Research Practice* (I ed., Sage 2004).

masculine and keeps the female (but also the queer) subject invisible.<sup>377</sup> Additionally, scientific knowledge is in itself fragmented, and cannot possibly represent social reality through universalising categories; therefore, a feminist viewpoint is useful to let subjectivities emerge in the scientific discourse,<sup>378</sup> especially in closed intensive environments such as prison.

The interview process was not designed to find “absolute truths” concerning the research questions, but to understand and give voice to the unheard. Among various interview styles, semi-structured interviews were preferred to give participants the chance to express their voices as it rarely happens with vulnerable minorities.<sup>379</sup>

Furthermore, interviews give attention to marginalised groups and the qualitative method avoids hierarchisation by exploring themes, patterns and fixity.<sup>380</sup> Their narratives represent an essential perspective to understand what issues arise in the prison context and whether the current legal and administrative frameworks address them properly. Ultimately, the LGBTQ community in prison is composed of several groups, but there are not enough data available to draw estimates in terms of quantitative analysis. More resources are needed and should be allocated to reach this goal.

### 3.5.2 Getting in, getting on, getting out: a method to access, conduct and analyse data inside prison

In designing my research method, I referred to three stages that Jewkes and Wright have called the “getting in, getting on and getting out” experience in dealing with empirical research in prison.<sup>381</sup>

Nowadays, there are two main obstacles for researchers who want to access prison establishments in England and in Italy. First, the researcher must obtain ethical clearance from their own university’s research ethics committee; secondly, they have to obtain the authorisation of a national governmental body. This process is characterised by a high degree of uncertainty: particularly, even if the researcher manages to get clearance at the national level, entrance to the prison selected for the study needs to be negotiated with the local governor,

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<sup>377</sup> See e.g. Patricia Waugh, ‘Postmodernism and feminism’, in Jackson and Jones eds., *Contemporary Feminist Theories* (Edinburgh University Press 1998), 177–193, at 177–178. On feminist research as a call for qualitative inquiry aimed at more flexibility than the positivist science research, see Katherine Allen and Alexis Walker, ‘A Feminist Analysis of Interviews with Elderly Mothers and their Daughters’, in *Qualitative Methods in Family Research*, Jane Gilgun, Kerry Daly and Gerald Handel eds. (Newbury Park, CA: Sage Publications 1992).

<sup>378</sup> Donna Haraway, ‘Situated knowledges: the science question in feminism and the privilege of the partial perspective’ (1988), 14 *Feminist Studies* 3, 575–599. This stream of feminist methodology is defined as pro-active research, where it is claimed that a specific feminist method should be developed to allow marginalised subjectivities to rise. In contrast, feminist empiricists affirm that androcentric scientific research can be corrected by relying on a strictly scientific method of inquiry. Liamputtong observes that feminist research is concerned with integrating women’s lives in science, with the aim of effectively promoting social change. See Liamputtong, n.358, at 9–14.

<sup>379</sup> The idea of giving voice to the invisible has a lot in common with feminist theory from the 70s, which used interviews to construct challenges to the predominant male forms of Western epistemology. Celia Kitzinger, n. 376; Sandra Harding, *Whose Science? Whose Knowledge?: Thinking from Women's Lives* (Cornell University Press 1991); Dorothy Smith, *The Everyday World as Problematic: A Feminist Sociology* (Boston, Northwestern University Press 1987); Ann Oakley, *Experiments in Knowing: Gender and Methods in the Social Sciences* (Cambridge: Polity Press 2000).

<sup>380</sup> Meezan and Martin, n.339.

<sup>381</sup> Jewkes and Wright, n.368, at 665 – 673.

and ultimately, with the prison staff on duty on the day when the interviews are supposed to take place.<sup>382</sup>

For both jurisdictions I preliminarily designed: a common framework to sample and recruit participants; an information sheet to hand potential participants in order to explain to them the scope of the research, the extent of their involvement in the project, as well as their rights and responsibilities, and how the research protects their anonymity and confidentiality; a protocol to obtain informed consent; an interview guidance, including strategies to address the emotional risks of the interviewing process for both the researcher and the participants.

Theoretically, the interview schedule should have been arranged as follows:

- An initial meeting where I could introduce the research to the prison staff and, if possible, to some potential participants of the project;
- One or more meetings to interview prisoners who would agree to talk with me. As a rule, the second meeting would be scheduled at least one week after the first access to the prison to allow participants to familiarise themselves with the project.

### 3.5.3 Accessing prisons in different jurisdictions

The elaboration of the research methodology necessitated thinking about accessibility issues specific to the jurisdictions under investigation.

#### *England and Wales*

The English system envisages two steps to do research in prison: a first one, consisting of getting ethical approval from the researcher's University Ethics Committee; a second stage, where they have to submit an application presenting the project questions, literature review and methodology before Her Majesty's Prison and Probation Service (HMPPS), via an online system called IRAS (Integrated Research Application System).<sup>383</sup> Each project has to be reviewed and approved by a National Research Committee, but if the investigation is limited to one or more establishments located in the same National Prison Service division, i.e. in one of the six English regions or Wales, it is the responsibility of the regional Research Committee to give a final evaluation to the application. Ultimately, the governing Governor of the selected prison for conducting the study also becomes involved in the decision process.<sup>384</sup> Criteria that the Committee take into

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<sup>382</sup> See Jewkes and Wright, id; Liebling, n.375; Luigi Gariglio, *Gaining Access to Prison: Authority, Negotiations, and Flexibility in the Field*, 10 February 2014, Oxford University Border Criminologies blog, available at [<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2014/02/gaining-access>], accessed 15 November 2017. Brosens also highlights the importance of interacting with various stakeholders to conduct prison research, stressing how management, prison staff and prisoners can influence the research project: Dorien Brosens and others, 'Building a Research Partnership in a Prison Context: From Collaboration to Co-Construction' (2015), 20 Sociological Research Online 3.

<sup>383</sup> See IRAS website, at [<https://www.myresearchproject.org.uk/>]

<sup>384</sup> National Offender Management Service, *Research Applications*, PSI 22/2014, 1 May 2014, par. 2.

consideration when evaluating applications to do research across Her Majesty's Prison and Probation Service include the project rigour and impartiality, relevance, legality and ethics;<sup>385</sup> more so, the study must contribute to the HMPPS Business priorities.<sup>386</sup>

The first phase engaged me during the first ten months of my PhD project. This transpired to be a lengthy process marked by a number of reviews and a dialectic process between the researcher, PhD supervisors and the Ethics Committee members. Once the ethical approval was obtained, I submitted an application to Her Majesty's Prison and Probation Service through the IRAS online system. In the months before completing the submission, I reached out to the two Governors managing prisons UK-1 and UK-2, a male and a female prison respectively. I discussed my project with them to look for their support and get informal permission to enter these prison establishments. Thanks to these informal talks, I learnt that UK-2 provides a LGBT support group, while UK-1 had appointed a Gender and Diversity Manager among prison staff. These findings led me to reconsider the initial plan for recruiting participants.<sup>387</sup>

Creating a network with local governors<sup>388</sup> to get them acquainted with the project helped to demonstrate to the HMPPS that the study is useful to the Prison Service objectives and could be of benefit for the penal establishments involved in the research, as well as for the overall community.

The presence of officers specifically dealing with equality and diversity issues defused some of the tensions described in the literature to obtain the institutional gatekeepers' consent and collaboration to get access to each penal institution, and to interact with participants.<sup>389</sup> Particularly, communicating with stakeholders who are aware of issues concerning sexual and gender minorities during imprisonment helped in adapting the recruitment process to the needs of each penal institution, while at the same time preserving participants'

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<sup>385</sup> National Offender Management Service, *Research Applications*, PSI 22/2014, 1 May 2014, par. 3.

<sup>386</sup> NOMS Commissioning Intentions from 2014; see also NOMS Evidence and Segmentation document 2014. NOMS Business priorities can be reduced to four main categories: Delivering the Punishment and Order of Courts; Security, Safety and Public Protection; Reducing Reoffending; Improving Efficiency and Reducing Costs. This PhD contributes to the development and analysis of the first two entries. Ensuring Equality, which is also part of the NOMS priorities, can be included within the Security, Safety and Public Protection category.

<sup>387</sup> Research has stressed the importance of cooperation with subjects working in the environment under study to develop an effective research design and increase the success of the recruitment process: Brosens, n.382.

<sup>388</sup> Although there is a risk that a high degree of control from the prison management can hinder the independency and impartiality of the project, communication and information exchange with prison governors and staff is necessary when conducting a study inside prison. Prison staff monitoring for security concerns, assisting in recruiting participants and bringing them for interviews are indeed unavoidable. However, researchers have observed how interactions with gatekeepers can be useful to better understand the dynamics of the prison environment, as well as to answer participants' questions about the study, when it is not possible for the researcher to interact with them before the day of the interview. See Knut Dalen and Lise Oen Jones, 'Ethical Monitoring: Conducting Research in a Prison Setting' (2010), 6 *Research Ethics* 1, 10-16. Brosens, n.382.

<sup>389</sup> On the importance of obtaining the cooperation of institutional gatekeepers, see e.g. Sue Heath, Vikki Charles, Graham Crow & Rose Wiles, 'Informed consent, gatekeepers and go-betweens: negotiating consent in child- and youth orientation settings' (2007), 33 *British Educational Research Journal* 3, 403-418. The literature has underlined how the particular limitations of the prison setting affect the relationship between the gatekeepers and the researcher, inevitably limiting the autonomy of the latter. Bosworth observes that "officers are limited by the culture of their job, which allows few critics or outsiders to comment: Mary Bosworth and others, 'Doing prison research: Views from the inside' (2005), 11 *Qualitative Inquiry* 2, 249-264, at 260. See also Annie Bartlett & Krysia Canvin, 'User views and ethical issues in qualitative methods', in Adshed G & Brown C eds., *Ethical Issues in Forensic Mental Health Research* (London: Jessica Kingsley Publishers 2003); Jewkes and Wright, n.368, at 659-676.

confidentiality to the maximum extent possible. Nevertheless, in spite of these preliminary contacts, obtaining access still proved to be a difficult and time-consuming process that delayed the research at various stages.<sup>390</sup>

By selecting both establishments, it was possible to include also women and transgender prisoners in the research sample. Furthermore, the choice of two establishments located in the North of England was based on the fact I am more familiar with this area in terms of culture and social habits. This proved to be useful to understand certain prison dynamics, and some aspects of participants' narratives that were influenced by the social context of where the two penal institutions are based. Ultimately, other points in favour of conducting the interviews there relied on the ease of reaching these establishments, and in keeping contact with the prison staff to organise the fieldwork.

I entered UK-1 twice, on the 14/11/2018 and 28/11/2018; and UK-2 on the 19/12/2018 and 27/02/2019 I conducted eight semi-structured interviews.

### *Italy*

In Italy, requests to conduct research in prison must be addressed to the National Prison Service (*Dipartimento di Amministrazione Penitenziaria – DAP*), a Department of the Ministry of Justice introduced by law 395/1990.<sup>391</sup> The National Prison Service has been reorganised in light of the decentralisation principle, in order to delegate competences, including prisoners' treatment, personnel, organisation of establishments and services, relationship with regional and local administrations, and institutions, to decentralised organs of the National Prison Service that can better deal with the needs of penal estates located in a specific territory (*Provveditorati Regionali dell'Amministrazione Penitenziaria – PRAP*).<sup>392</sup> There are currently 11 regional departments.<sup>393</sup>

The prison establishments where I initially planned to conduct my interviews are located in different regional areas. For this reason, and due to the choice of audio-recording the interviews, a request had to be submitted to the Director of the National Prison Service. Moreover, the recruitment process, time schedule and questionnaire content had to be negotiated with the Governor and staff of each selected prison.

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<sup>390</sup> This is an issue highlighted by many prison researchers: see e.g. Nalita James, 'Research on the 'Inside': The Challenges of Conducting Research with Young Offenders' (2013), 18 Sociological Research Online 4. Nevertheless, it cannot be ignored that prison guards have specific tasks to accomplish, while they shall adapt their workload to accommodate the needs of the researcher. This can often be perceived as strange to the system, an anomaly disrupting the usual schedule. Still, prison officers should not be considered as a monolithic category, as their reactions to the research topic and to the researcher's presence can vary. The researcher should try to balance the research aims against the guarantee of protection of prisoners' confidentiality and anonymity, and take into account the responsibilities attached to prison staff duties. This was my experience when conducting my fieldwork, while other researchers dealt with similar dynamics: see e.g. Brosens, n.382, at 6; Dalen and Jones, n. 388, at 15; Gariglio, n.382.

<sup>391</sup> Italy, Law 15 December 1990, n. 395, (Ordinamento del Corpo di polizia penitenziaria), Official Gazette General Series n.300 of 27-12-1990 – Ordinary supplement n. 88), Art. 30.

<sup>392</sup> Ibid, Art. 32.

<sup>393</sup> The recent decree of the President of the Council of Ministers 15 June 2015, n. 84, Table B, re-designed the number and competences of the regional departments of the National Prison Service. The departments are: Campania; Veneto – Friuli Venezia Giulia – Trentino Alto Adige; Puglia – Basilicata; Lombardia; Calabria; Emilia Romagna – Marche; Sicilia; Toscana-Umbria.

The Ministry of Justice has not developed an online application system similar to IRAS; on the contrary, the application should be written as a formal request, describing the research questions and aims, the methodology, which establishments the researcher is planning to visit, and clarifying whether the project has been approved by an ethics committee.

To plan my empirical work in Italy, I did not approach local governors operating in prison estates, but I first contacted experts in the field that could act as gatekeepers, so as to understand how to conduct research in Italian prisons, and to select penal estates appropriate for the study. After several attempts, I met with Sofia Ciuffoletti, who has investigated the conditions of transgender prisoners in various Italian prisons. Sofia is also the director of *L'Altro Diritto*, a Resource Centre at the University of Florence conducting theoretical and sociological research on prisons that has concluded an agreement with the National Prison Service to undertake sociological studies inside prisons, and also to provide legal advice to inmates.<sup>394</sup>

The Centre has developed contacts with a number of penal establishments across the Italian territory. *L'Altro Diritto* agreed to support my request to the National Prison Service Department, and they offered to share their contacts and expertise to facilitate the organisation of the fieldwork. Their role was essential in gaining the trust of the prison officials in charge of the penal establishments under analysis, and to select the three prisons where I conducted my interviews.<sup>395</sup> As reported by other academics, doing prison research in a “low trust environment” adds to the already numerous challenges of prison research.<sup>396</sup>

### 3.5.3.a Fieldwork in Italy: adapting the research design to the field

I undertook my fieldwork in Italy after obtaining the DAP approval in April 2018. I based myself in Florence between July and August to complete the interviews. I initially contacted by e-mail or on the phone the Governors and members of the Rehabilitation Team in each of the selected prisons. There were a number of reasons behind the choice of these three penal institutions. These prisons were chosen specifically because

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<sup>394</sup> See *L'altro diritto, Centro di documentazione su carcere, devianza e marginalità*, at [<http://www.altrodiritto.unifi.it/chiamo/index.htm>], accessed 25 October 2017. Volunteers can also access Italian prison according to Art. 17 law 354/1975 (*Norme sull'ordinamento penitenziario e sull'esecuzione delle misure privative e limitative della libertà*): law 26 July 1975, n. 354, Norms on the Prison regime and on the execution of measures to limit or deprive liberty (Official Gazette 9 August 1975, Ordinary supplement n. 212) (Italian law on prison).

<sup>395</sup> My experience reflects what was noted by Tim Rapley, that is that recruitment can be a very unpredictable process, particularly with participants who are difficult to get in contact with. Rapley observes that a researcher must often rely on colleagues, friends, informal contacts, though it is important to try having as wide a range of views as possible in sampling participants. See Tim Rapley, ‘Interviews’, in Seale, Gobo, Gubrium and Silverman eds., *Qualitative Research Practice*, (SAGE, 2004). The cooperation and support of *L'Altro Diritto* proved to be invaluable within the Italian context to contact and gain the trust of gatekeepers, particularly social workers inside each visited prison, which in turns helped in obtaining the collaboration of prison guards, i.e. the ultimate gatekeepers, who bring the participants to the researcher. See Nicholas Freudenberg, ‘Health research behind bars: a brief guide to research in jails and prisons’, in Robert Greifinger ed., *Public health behind bars: from prison to communities* (New York: Springer 2007), 415-433. Differently from prison guards, social workers showed more interest in the project and – due to their role focusing on designing and practising rehabilitation programmes – they were generally less concerned about security issues. This reflects the experience of other prison researchers: see e.g. Brosens, n.382, at 6.

<sup>396</sup> Liebling, n.175.

they either provided special sections for categories of prisoners included in my sample, or they ensured more chances to find individuals willing to participate and reflecting the sample.

Firenze-Sollicciano is a female prison that runs a special section hosting transgender (MTF) prisoners. This is the only case in Italy where transgender people are allocated in a female institution.<sup>397</sup> ITA-3 is a male prison that also set up a special section for transgender inmates. Finally, ITA-5 was selected as a female prison with a large prison population where I could interview inmates who identify as lesbians.<sup>398</sup>

Unfortunately, I had to make some changes to the original plan, as I could not enter Firenze-Sollicciano prison as originally foreseen. During the summer I stayed in Florence, the prison rehabilitation team was understaffed and claimed that they did not have time to meet me, though I tried to explain that the initial introductory meeting would normally last no longer than half an hour with the staff, while the following meetings to do the interviews would have not required any particular involvement from the rehabilitation team. On top of this, in the month of August a part of the prison ceiling fell down in the section where transgender prisoners are usually hosted. This circumstance made it impossible to get in.

Nevertheless, some of the transgender prisoners hosted in ITA-3 had been also in Sollicciano before I met them, so I could collect some indirect accounts regarding their experience there.

Another issue arose in relation to the ITA-3 prison. As mentioned above, the prison staff did not allow the distribution of the information sheet and questionnaire to the general prison population, thus forcing me to limit the sample to prisoners who declared their sexual orientation or gender identity. However, until a few months before my arrival at ITA-3, the prison authority launched an experimental programme by placing both homosexual prisoners and transgender MTF inmates together in the same section. This caused a variety of institution. At this point, I managed to get in contact with the regional Ombudsman for the rights of persons deprived of their liberty monitoring the territory where ITA-3 and ITA-4 are located; he suggested integrating my original application to the National Prison Service (DAP) by including a request to access ITA-4 prison. The addendum was sent to the regional PRAP, which agreed to extend my authorisation also thanks to the Ombudsman's support.

I entered ITA-3 prison three times, on the 12/07/2018, 7/08/2018 and 23/08/2018; ITA-4 prison on the 8/08/2018 and 28/08/2018; and ITA-5 on the 25/07/2018 and on the 27-29/08/2018. I completed 13 semi-structured interviews.

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<sup>397</sup> See Dias Vieira and Ciuffoletti, n.270.

<sup>398</sup> According to the 2018 report of the Italy Ombudsman on the rights of prisoners and people deprived of their liberty, in Italy there are 10 special sections that host transgender prisoners, and two special sections dedicated to homosexual prisoners. Data from the Italian National Prison Service show that these sections hosted 58 transgender and 22 homosexual men. Data do not consider prisoners who did not disclose their sexual orientation or gender identity, or that identify as gay or transgender but did not apply to be allocated in a special section. See Ombudsman for the rights of persons detained or deprived of their liberty, Report to Parliament 2018, n.364.

### 3.5.4 Getting on: The recruitment process; conducting interviews inside prison

The original research design provided for the recruitment process to be negotiated with the Prison Administration. Whenever possible, a meeting would be arranged to introduce the researcher and the study to pre-selected potential interviewees. In principle, prison is a highly controlled environment. It is not possible to talk with prisoners without previous authorisation, while any meetings are planned in advance with the Point of Contact, which in my case was a member of the Rehabilitation team for each prison establishment. Usually, the Point of Contact would take care of informing the prison staff in charge of monitoring the special section of my arrival.

In penal estates such as UK-2, where LGBT support groups are organised, I would have attended a meeting, and at the end, handed to the people present an information sheet and a questionnaire to be filled in by the people who were willing to participate. In the alternative, where a preliminary talk in person was not possible, I would have distributed an information sheet and a questionnaire to a part of the general prison population through the assistance of members of the prison staff.

The information sheet illustrated the purpose and nature of the research, and details on consent, confidentiality and anonymity. Inmates would have been handed a second piece of paper attached to the information sheet, including a number of preliminary questions to inquire whether they would agree to be interviewed, and how they would identify themselves, although it was made clear that they were not compelled to reveal this information. The questionnaire could be distributed only after receiving the approval of the prison staff. The latter could not check prisoners' answers, in order to protect their privacy and to comply with the University Ethics Committee review. As an extra precaution, the questionnaire paper was attached to the information sheet as the last page, so as to have it covered when the questionnaires were collected.<sup>399</sup>

This original plan had to be slightly re-adapted according to the different reality and procedures in place for each prison.

#### 3.5.4.a Recruitment process at ITA-3

ITA-3 was selected for the presence of a special section hosting transgender inmates. At the time of my first visit, the section hosted four MTF transgender inmates, but the total number increased to 12 about one month after. This rapid increase created serious problems for the prison staff in charge of managing the section.

I arranged a first meeting by e-mail in mid-July 2018. I was welcomed by a representative of the rehabilitation team, and by the local Ombudsman on the rights of prisoners and persons deprived of their liberty.<sup>400</sup> Probably

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<sup>399</sup> This precaution was introduced in light of the Williams Institute report on conducting surveys involving LGBT people (n.363).

<sup>400</sup> In Italy, the national preventive mechanism introduced by the UN Optional Protocol to the Convention on the Prevention of Torture and other forms of inhuman or degrading treatment is composed of the national Ombudsman on



also thanks to the support and presence of the Ombudsman, a group meeting with four prisoners, the Ombudsman and myself was organised in a room next to the special section, where social workers usually meet transgender prisoners. During this first contact, I talked the group through the project and answered their questions. Some of them probably attended the meeting because of the presence of the Ombudsman, as they took the opportunity to share some complaints with him. Nevertheless, I managed to explain the research and to leave the information sheet and the questionnaire.

On my second access in early August 2018, only one of the people I had met before decided to be interviewed. Another one asked to postpone the interview, but unfortunately she ultimately decided not to be involved in the project. Nevertheless, I interviewed a transgender inmate I had not met the first time, who read the information sheet and agreed to participate. I also chatted for about half an hour with a transgender inmate who was a friend of hers, but did not know about the research. She took some time to decide whether to participate or not. I was later informed by my Point of Contact that she wished to do so, and the interview took place in late August.

As explained above, I could not interview any male prisoners among the general population at ITA-3, as none of them publicly self-identified as homosexual or transgender when I was there.

Meeting potential participants in groups before completing the interviews was quite useful. I became more familiar with the interviewees and talked to them informally. In addition, it gave me the chance to observe group dynamics, which gave me a better sense of each prisoner's personality. It was also easier to establish a researcher-participant relationship during the interview and find the right pace for the discussion.

#### *3.5.4.b Recruitment process at ITA-4*

ITA-4 prison was not originally included in the research design. The complex is a male prison managed *ad interim* by the Governor of another penal estate located in the same region. Prison staff is mixed: some work at ITA-4 on a permanent basis, others come from ITA-3 on a part-time basis. As I found out, this was the case for my Point of Contact at ITA-3.

For the reasons explained above, the prison administration created a special section for homosexual male prisoners in ITA-4.

I visited it for the first time in early August. Unfortunately, the Governor and prison staff had not been informed of my arrival by my Point of Contact. Therefore, I could talk to the Governor, who showed interest in the research, but not to the prisoners. The information sheet and the questionnaire were distributed by the prison staff.

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the rights of prisoners and people deprived of their liberty, regional Ombudsman and a series of local Ombudsmen in the aim of creating a network that can cover the whole Italian territory.

At the time of my second visit at the end of August, 12 homosexual men were living in the special section. Three agreed to be interviewed while seven people filled in the questionnaire, but they denied the authorisation to be interviewed.

#### *3.5.4.c Recruitment process at ITA-5*

ITA-5 is a complex that includes a large building hosting female prisoners. The prison has been selected to sample participants who identify as lesbian or women who have sex with women. My first visit took place in late July to meet my Point of Contact, a guidance counsellor who is part of the prison rehabilitation team. She showed great interest in the research, and we negotiated together a recruitment method where she would have played an intermediary role between researcher and potential participants. She approached women under her responsibility that she knew would be interested in being interviewed. This led to some changes as compared to the initial recruitment plan. It could have given rise to breaches of prisoners' privacy and anonymity. However, ITA-5 hosted too many female inmates to distribute the information sheet and questionnaire to all of them. Additionally, all participants felt comfortable in expressing their sexual orientation inside prison, and some of the interviewees were openly in a same-sex relationship at the time of the interview. Furthermore, participation in the research became part of their file as an activity that was undertaken as integral to their rehabilitation programme.

#### *3.5.4.d Recruitment process at UK-1*

UK-1 is a Category B men's Reception Prison. Here I recruited three participants who self-identified as gay men, and one participant who identified as transgender female, who manifested her gender identity after accessing prison. Before that, she had always identified as male.

My first visit took place in April 2017 before starting the application process to get clearance to conduct interviews inside prisons from the HMPPS. The Governor's interest in the project, along with the support of the Staff Head of Safeguarding and Diversity, represented important evidence for the success of my application before the Ministry of Justice.

I met with the Head of Safeguarding more than one year after, in December 2018, to decide how to recruit participants. Differently from the Italian prisons I visited, at UK-1 there is no special section for homosexual prisoners, as the general prison policy aims at integrating sexual minorities with the prison population. However, homosexual men who are open about their sexual orientation are not located with the main prison population; instead, they are hosted in the Vulnerable Population Units (VPU), where also sex offenders<sup>401</sup> and other vulnerable prisoners usually live (e.g. paedophiles or former police officers). Prisoners within the general

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<sup>401</sup> Under Rule 45 of the Prison Rules, governors are allowed to isolate prisoners either for their own protection or to ensure good order and discipline.

population tend to remain in the closet for fear of becoming victims of discrimination, violence and homophobia.

Security concerns limited my sample to prisoners hosted in the VP unit. I could not approach them directly; instead, they had been approached personally either by the member of staff in charge of the diversity policies within the VP unit, or by the LGBT prisoners' representative, recently appointed, who I also interviewed.

I conducted the interviews in late November during one day. The interview process presented some challenges, due to the limited amount of time I had to complete the interviews (circa three hours for four interviews). There also were a few interruptions during the interviews, which made it difficult at times to ensure the conversation flowed easily.

#### *3.5.4.e Informed consent and anonymity*

Informed consent proved to be an especially sensitive issue in conducting qualitative analysis through interviews with convicted prisoners. It was important to convey in a relatively short time all the necessary information about the project to potential participants, particularly stressing the aims and scope of the research, and that participation in the project was voluntary, with no negative consequences deriving from refusing to be part of the study. The sensitive nature of some of the topics discussed had to be clearly communicated. Potential lower educational levels among prisoners than the general adult population had also to be considered. Thus, the information sheet was designed to be as simple as possible. Participants were afforded at least one week to reflect about the implications of the interview, so as to consciously decide if they wished to participate. The information sheet guaranteed an informed consent by including details concerning: the object and scope of the study; the topics of discussion; the data required from participants; how the data collected will be analysed; how long the data will be held; the expected outcomes of the study.

It was drafted in two languages, Italian and in English, in light of the jurisdictions chosen to complete the study.

In the UK, the information sheet complied with the 1998 Data Protection Act. It also respected the recommendations of the Economic and Social Research Council's (ESRC) Research Ethics Framework.<sup>402</sup> It included certain details on the scope of the project, the structure and topics of the interview, and the extent of participants' involvement. Since the data have been examined at a UK university, according to the Italian law on Privacy the document shall comply with English legislation.<sup>403</sup> The document had to be reviewed in May

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<sup>402</sup> See Northumbria Research Ethics and Governance Handbook, Seventh edition 2014-15, at [<https://www.northumbria.ac.uk/static/5007/research/reg handbook.pdf>]; ESRC, *What is freely given informed consent?* at [<http://www.esrc.ac.uk/funding/guidance-for-applicants/research-ethics/frequently-raised-questions/what-is-freely-given-informed-consent/>], accessed 22 February 2019.

<sup>403</sup> Italy, Legislative Decree 30 June 2003, n. 196 (Official Gazette 29 July 2003, n. 174. Ordinary supplement n. 123) *Codice in materia di protezione dei dati personali* (Code on privacy).

2018 to comply with the new EU General Data Protection Regulation (GDPR), which has modified some of the provisions concerning privacy law in all EU Member States.<sup>404</sup>

I decided to audio-record participants' consent before the beginning of the interview. I referred to Roberts and Indermaur's research on prison to undertake this approach, in light of prisoners' reluctance to sign written documents possibly including sensitive information about themselves – such as information on their sexual orientation or gender identity – for fear of retaliation from other prisoners, or of the staff breaching their privacy by reading the signed forms. Even if these fears were unfounded, they could possibly compromise the authenticity of prisoners' answers in an already very controlled setting. Thus, by recording participants' consent, it is possible for the researcher to comply with socio-legal research ethical standards while increasing the chances to make interviewees comfortable and keener on sharing their experience.<sup>405</sup>

Nevertheless, in certain circumstances participants decided to sign their consent. Particularly, female prisoners at ITA-5 all opted for this solution, since a copy of the signed consent would be used as evidence of their rehabilitation process, and would be included in their file.

Anonymity protocols were designed for the recruitment process, as well as for the data collection and analysis stage. Participants were reassured that no information would have been disseminated that could make it possible to recognise them or any other persons involved in the study or mentioned during the interview.

All participants' names, as well as the identities of third parties who may be mentioned during the interview, have been made anonymous in notes, and during the transcribing and analysis phase. They have been replaced with pseudonyms (e.g. interview with Gloria). Any potentially identifying details linked with particular cases have been changed, and any information identifying an individual prisoner or a third party removed. All documentation has been made anonymous to maintain participant's confidentiality.

#### 3.5.4.f *The interview: an interactive construction of knowledge*

The interviews with prisoners were semi-structured. The semi-structured method offers the possibility of starting with open-ended questions putting the interviewees at ease, for then moving towards a more specific inquiry based on the research theoretical framework.<sup>406</sup> I used guidance that covered a number of themes

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<sup>404</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1-88.

<sup>405</sup> Lynne Roberts, David Indermaur, 'The Ethics of Research with Prisoners' (2008), 19 *Current Issues of Criminal Justice* 3, 309-326; Lynne Roberts, David Indermaur, 'Signed Consent Forms in Criminological Research: Protection for Researchers And Ethics Committees but a Threat for Research Participants?' (2003), 10 *Psychiatry, Psychology and Law* 2, 289-299.

<sup>406</sup> Galletta, n.375, at 45-72; Steinar Kvale, *Interviews: An Introduction to Qualitative Research Interviewing* (London: Sage Publications 1996); Morris, n.372; John M Johnson, 'In-Depth Interviewing', in Jaber F Gubrium and James A Holstein, *Handbook of interview research: context & method* (Sage 2001), 103-120. Herbert J Rubin and Irene S Rubin, *Qualitative Interviewing: The Art of Hearing Data* (2nd ed. Sage 2005). Meezan and Martin, n.339; Alan Bryman, *Social Research Methods* (Oxford University Press 2015), 465 – 499.

relevant to the research questions. For each theme, I considered a number of core questions that I deemed relevant to the study, based on the literature review and on the main provisions recurring in main human rights instruments dealing with prisoners' rights, particularly the Standard Minimum Rules on the Treatment of Prisoners, the European Prison Rules and the Yogyakarta Principles on Sexual Orientation and Gender Identity. For each jurisdiction, I also considered the rules included in national laws and regulations to address potential issues of concern.<sup>407</sup>

The main topics covered in the interview guidance concerned prisoners' self-identification regarding their sexual orientation or gender identity, and whether they disclosed it to public authorities during trial or when entering prison; the process of location into prison; the characteristics of the prison wing or special section; questions about prison life, particularly concerning the impact of being homosexual, lesbian, transgender or non-heterosexual in the relationships with prison staff and other inmates; experiences of intimacy, even including sexual contacts, with other prisoners; contacts with the outside, in terms of communication by letter or by phone, and of actual visits in prison; the possibility of accessing temporary leave permits. Finally, participants were asked questions concerning the laws and policies in force regarding protective measures for LGBTQ people inside prison, and on the legal approach to sexuality and gender identity in penal institutions.

The original guidance presented the same topics and line of questioning for all participants. During the interview process, changes were made to some of the questions, and to the space dedicated to certain issues, in order to adapt the interview to the experiences of each group, and to the specific problems characterising each penal establishment.

For instance, in the interviews with transgender prisoners the difficulty in accessing healthcare services emerged much more prominently than for other groups, mainly due to the fact that the interviewees were transitioning from male to female and were struggling to continue their hormone treatment while in prison. Another important change had to be made in relation to the topic of allocation and protection from the general prison population: while this was a prominent topic of discussion for interviewees placed in male prisons, where gay and transgender inmates are hosted in special sections separate from the general population, in the female prisons I visited there is no such distinction for lesbian women.

#### *3.5.4.g Relationship between the researcher and research participants*

The approach to the interview as a site of knowledge is owing to Seale's distinction between interview data as resource and interview data as topic. The former considers the data collected in the interview as a reflection of the interviewee's reality outside the interview, while by considering interview data as topic, the focus is on the interactional nature of the interviewing process, where knowledge is constructed by the relationship arising

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<sup>407</sup> For an in-depth analysis, please see Chapters 5 and 6.

between researcher and participant.<sup>408</sup> The latter vision is more apt to consider the production of meanings arising from the language used during the interview in the spatial and temporal context where the interview takes place.<sup>409</sup> The aim of this research is not to find absolute truths, but to analyse the influence of normative institutional supra-structures on prisoners' accounts of sexuality, identity, relationships, and how they relate to legal categories produced by the human rights discourse, such as equality, dignity and non-discrimination. The interview cannot but capture a relative understanding of these experiences, which vary according to individual experiences, to the prison where participants were located, as well as to the relationship they built with the researcher.<sup>410</sup> This does not mean that common themes have not been detected, as threads have emerged from the interviews even in light of contrasting accounts on certain topics. Still, they were influenced by the relativity of the moment when they were told, and probably by my personal characteristics as interviewer.<sup>411</sup>

The effects of the constructive relationship between the two subjects of the interview dialogue had to be taken into account. For instance, the interview structure brought the interviewees to disclose very intimate aspects of themselves, and to answer questions about their sexual orientation or their gender identity, even leading them to expose narratives of coming out outside or inside prison. The interviewees were asked to identify themselves among a series of definitions describing various sexual orientations (e.g. gay, lesbian, bisexual, heterosexual) and gender identities (e.g. male, female, transsexual, transgender). Participants often offered answers out of the standardised scheme, or problematised the choices given. Even when they fit one of the suggested categories, the dialogue between the researcher and the participant revealed different meanings to different people at different times and places. Also the particular culture connoting each prison influenced participants' descriptions of sexuality or gender identity definitions.<sup>412</sup>

The interview process required questioning my positionality as a homosexual researcher in relation to the research participants and to the topics under discussion. As observed by other researchers, being homosexual can represent a privileged position when dealing with issues of same-sex sexualities and gender, as it can offer an insider perspective to the topic. On the other hand, it can also be counterproductive, since the researcher risks making assumptions on certain themes that may not be so obvious.<sup>413</sup> For instance, experiences of coming

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<sup>408</sup> Clive Seale, 'Qualitative interviewing', in Clive Seale ed., *Researching Society and Culture* (London, SAGE 1998). See also Tim Rapley T, *Encountering method*, in in Seale, Gobo, Gubrium and Silverman eds., *Qualitative Research Practice*, (SAGE, 2004), 16-17.

<sup>409</sup> Rapley, *ibid*.

<sup>410</sup> On the relationship between interviewer and respondents where the latter can be constructor of knowledge, see Gubrium and Holstein, n.374, at 68.

<sup>411</sup> This consideration on the relativity of interviews and on the explicit or implicit influence of the interviewer in the interview data collection and data analysis is shared by post-modernist and feminist theory: see e.g. Ian Parker, 'Discursive Psychology' (1997), in Dennis Fox and Isaac Prilleltenskyeds., *Critical Psychology: An Introduction* (London, SAGE 1997), 284-298; Kitzinger, n.376.

<sup>412</sup> The impact of prison culture in the labelling of identities and sexual orientations has been documented by the literature: see eg. Kunzel, n.194; Sabo and others, n.210; Wooden and Parker, n.226. Feminist theory has investigated the impact of macro and micro structure in the interviewees' "coming out" in relation to intimate topics, including sexual orientation. See Kitzinger, n.376, at 136 and following.

<sup>413</sup> Michael La Sala, 'When Interviewing "Family": Maximizing the Insider Advantage in the Qualitative Study of Lesbians and Gay Men' (2003), 15 *Journal of Gay & Lesbian Social Services*.

out may evoke familiar memories, and elicits a dialogue that takes into account certain factors that could be overlooked by a heterosexual interviewer. However, every experience is different: my background as an academic brought me to develop specific ideas concerning sexual orientation or gender identity that are different from the ones of individuals who have worked or lived in different environments, or who came originally from different countries, and thus had a diverse perception of these characteristics, not to mention the impact caused by having spent time in confinement. For example, Riccardo, one of the interviewees is a gay white male older than 50 who has lived for most of his life in the North West of Italy, and had very specific opinions on what “being gay” means, deeply connected to a certain idea of masculine behaviour. His description of homosexuality does not necessarily correspond to mine.

Furthermore, as a white gay male, I do not necessarily have a better understanding than a heterosexual researcher of the interrelation between gender and sexual orientation which emerged in interviews with lesbian prisoners, or of the challenges faced by transsexual Latin-American MTF persons.

During fieldwork, I sought to pay attention to possible bias or preconceptions linked with my personal story, or simply of the effect that my role in the project could have in participants’ level of comfortab in talking to me.<sup>414</sup> I decided before starting my data collection that I would be as transparent as possible about my personal life with participants in case they had questions about me or my background. It seemed fair to me, since I was asking them to reveal personal, sometimes deeply intimate aspects of their lives, and I believed it would have confirmed my statement that I was there to learn from participants, not to teach them.<sup>415</sup> That is why I decided to disclose my sexual orientation if any of the interviewees posed this question. It happened only twice: in one case with a gay man, which helped creating a connection, yet at the same time forced me to be very careful in delineating the boundaries between researcher and participant, as the interviewee started making appreciative comments about my personal appearance.

There is a thin line between creating a trustworthy experience and ensuring that the professional nature of the exchange remains clear. Being honest about the scope of the research, my role as PhD student, and being ready to share personal details when appropriate and when I was comfortable to do so, helped me to avoid the population involved in the study becoming resistant to the project itself and thus creating what Fielding defines as a hostile environment.<sup>416</sup>

Prison represents a particularly closed setting that could give rise to oppositions to the research: in my experience, this did not happen, and I often benefitted from the use of intermediaries that presented the project to prisoners on my behalf. However, I encountered some forms of moderate resistance when I tried to extend the recruitment process to the general prison population in male prisons, as it would have implied a challenge to consolidated practices among the prison staff, and an inherent criticism towards their preconceptions

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<sup>414</sup> On the relevance of the interviewer’s educational background in the interview data collection, see La Sala, id, at 22.

<sup>415</sup> Meezan and Martin stress the importance of such an approach in qualitative studies with marginalised populations. Exploring current themes in research on GLBT populations. See n.339.

<sup>416</sup> Fielding, n.338.

regarding sexual orientation or gender identity.

### 3.5.5 Getting out: analysing the data from a queer perspective

The most appropriate methodology to analyse the collected data had to be carefully assessed in light of the adopted queer theoretical framework, and of the interpretation of interviews as a constructionist site of knowledge. The qualitative approach was mostly deductive, as it referred to the research questions and the existing literature, yet with some inductive aspects, based on particular themes emerged during the interviews. A thematic analysis best served the research scope. Although thematic analysis is often interpreted as a synonym for other forms of qualitative analysis, such as content analysis, discourse analysis, or narrative analysis, Browne and Clarke have focused on thematic analysis as a method in its own nature.<sup>417</sup> Even if there is no agreement on the definition of thematic analysis, also because many forms of analysis are essentially thematic, they agree it usually involves a degree of identification of patterns across a set of data, and their subsequent interpretation in light of a theoretical stance. It is a “flexible” method, which can be applied to realist theoretical frameworks as well as more interpretivist, post-structuralist epistemologies such as the queer analytical approach of this study.<sup>418</sup> However, differently from narrative analysis, a thematic analysis does not limit itself to pre-eminently find patterns within a data item, but allows looking for themes across data patterns.<sup>419</sup>

The process of enucleating themes among prisoners’ narratives cannot be merely described as letting the voice of participants emerge. The interviewing process implied the construction of knowledge as the result of the interaction between the researcher and their participants,<sup>420</sup> as also underlined by experts researching queer communities.<sup>421</sup> The specificity of such interaction was considered while collecting, transcribing and analysing the data.

A queer analysis – including elements of feminist theory – of recurring themes in the elaborated data set, leads us to ponder not only the internal meanings of each interaction, but also to consider the broader socio-cultural context influencing participants’ identities and experiences, as well as the narrative strategies which these experiences narrate.

In this perspective, the thematic analysis recalls certain features of discourse analysis by enucleating textual, intertextual and contextual meanings. Particularly, the investigation of prisoners’ narratives cannot disregard

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<sup>417</sup> Virginia Browne and Victoria Clarke, ‘Using thematic analysis in Psychology’ (2006), 3 *Qualitative Research in Psychology* 2, 77 – 101.

<sup>418</sup> Browne and Clarke, *ibid.*

<sup>419</sup> For a discussion on narrative analysis, see Andrew Sparkes and Brett Smith, ‘Narrative Analysis as an Embodied Engagement with the Lives of Others’, in Jaber Holstein and James Gubrium eds., *Varieties of Narrative Analysis* (SAGE 2012).

<sup>420</sup> Browne and Clarke, n.417.

<sup>421</sup> Meezan and Martin, n.339.



the spatial and temporal context where the interview took place, and more broadly, the societal, cultural (and I would say legal) context of reference.<sup>422</sup>

Context can acquire different meanings: for instance, Gee observes that it should encompass also the non-verbal elements that affect the exchange between the researcher and the interviewee, both spatial (e.g. the interview location) and non-spatial. The latter may include factors playing a role during the interview, such as the body language, or the shared knowledge between the subjects doing the interview. Ultimately, discourse analysis is able to capture the normative framework established by power dynamics regulating the social context in which the interview is conducted.<sup>423</sup>

As theorised by Foucault, fields of force characterise discourses, which produce knowledge embodied not only in language as a tool of communication, but also in the institutional discourse established in institutions such as prison, where social relationships are heavily regulated and sexualised.<sup>424</sup>

The interviews were recorded and transcribed into written texts, and subsequently analysed to look for connections among data. I used NVivo coding, a well acknowledged program of thematic analysis, to select words and phrases meaningful for acknowledging how prisoners had perceived themselves and in relation to other inmates, the staff, and more generally to the prison environment. Additionally, I referred back to the notes I took during and immediately after each interview in order to enrich the data analysis. I organised the data by looking for connections between the current international and national legislation and prison regulations, especially if relevant to LGBTQ inmates, and focused on how these were experienced by the interviewees. The analysis also opened up to overarching themes emerging across all interviews, across establishments and across jurisdictions, to underline common findings and allow generalisation of findings and identification of supra-structural normative dynamics.

### 3.5.6 A comparative method to analyse the process of internalisation of international human rights norms

The queer socio-legal analysis was conducted by looking at the main themes in light of the legal frameworks of England and Italy. The research undertook primarily a “vertical” comparison between national frameworks and international human rights principles relevant to sexual and transgender minorities in lawful imprisonment,<sup>425</sup> to test the degree of internalisation of human rights norms, and the effectiveness of such

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<sup>422</sup> Jackie Abell and Gregg Myers, ‘Analysing Research Interviews’, in Ruth Wodak & Michal Krzyzanowski eds., *Qualitative Discourse Analysis in the Social Sciences* (Palgrave and McMillan 2008), 145-161.

<sup>423</sup> James P Gee, *How to do discourse analysis: a toolkit* (Taylor & Francis Group 2011), at 6.

<sup>424</sup> Joan Scott, ‘Deconstructing equality versus difference: Or, the use of poststructuralist theory for feminism,’ in Steven Seidman ed., *The Postmodern turn: New Perspectives on Social Theory* (Cambridge University Press 1994), 282 – 298. See also Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977* (New York: Pantheon 1980).

<sup>425</sup> These principles include, but are not limited to, relevant statements and recommendations emerging from the overview of the work of UN treaty and political bodies, particularly the Standard Minimum Rules on the Treatment of Prisoners (Mandela Rules), and other soft law instruments such as the Yogyakarta Principles on Sexual Orientation and Gender

processes through the lens of queer theory.

When appropriate, the “vertical” comparison intersected with the “horizontal” comparison between the two jurisdictions to underline noteworthy similarities and differences in the domestication and enforcement of human rights norms relevant to the issues under analysis.

A queer analysis was applied to the comparative method, leaving the possibility open to criticise elements of heteronormativity or hypermasculinity in the international legal framework, in order to underline the necessity disruption of the international perpetuation of oppressive normative paradigms.

### 3.6 Ethical challenges of doing research in prison: discussing sexualities and gender expressions with prisoners

Researching prison implies a series of practical barriers that can influence the research methodology, and requires the researcher to balance the scope of the study with ethical considerations and the unavoidable negotiation between expectations and institutional constraints.

The ethical challenges linked with the study required an in-depth analysis of the administrative system regulating the English and Italian penal framework.

In order to address the ethical implication of the project, I referred to the main Protocols and Regulations observed by the academic community. However, the prison environment presents different characteristics as compared to other venues. Accessing places of detention is not easy, and the many bureaucratic and practical barriers to enter prisons required reviewing ethical guidelines in light of the specific challenges of doing prison research. I consulted various codes of ethical principles: the 2016 Northumbria Research Ethics and Governance Handbook; the 2009 Socio-legal Studies Association Statement of Principles of Ethical Research Practice;<sup>426</sup> and the 2015 British Society of Criminology Statement of Ethics for Researchers.

Principles common to all documents mentioned above include conducting the research with integrity and responsibility, i.e. being honest about the researcher methodology, aims and objectives, and treat colleagues and participants with courtesy and respect; possessing the necessary training to undertake a high quality study in accordance with competence standards as stated by main ethical codes; being responsible towards research participants, which entails respecting their human dignity and ensuring their protection by respecting their

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Identity, adopted in 2006 and reviewed in 2017. At the European level, the Council of Europe recommendations concerning prison conditions, particularly the European Prison Rules, constitute an important reference for assessing the management of prison conditions in the two selected jurisdictions. The work of the European Committee for the Prevention of Torture, and the case law of the European Court of Human Rights will be also considered. Particularly, cases involving the right to be free from torture, inhuman and degrading treatment (Art. 3 ECHR), and the right to private and family life (Art. 8 ECHR) will be analysed when these principles have been invoked to call for protection of prisoners' rights in the area of sexual orientation and gender identity.

<sup>426</sup> The author is a member of said association.

anonymity and confidentiality, as well as designing the research method by keeping in mind their physical and psychological wellbeing.

Regarding prison research, these general principles have to be balanced with factors such as: the institutional barriers characterising the penal estate; the participants' status, which generates an asymmetrical relationship with the researcher; time and spatial constraints that can be harmful for the interviewees; issues concerning the voluntariness of prisoners' participation may also arise.

### 3.6.1 The process to obtain ethical clearance

Different procedures are used around the world to obtain ethical clearance for research projects. European universities usually establish Research Ethics Committees whose task is to evaluate that each research project complies with standard ethical protocols.<sup>427</sup> Primarily, to conduct research involving empirical work when affiliated with an English university, it is necessary to pass the evaluation of a Committee internal to the university. This process can be – as it was in my case – particularly lengthy, for a series of reasons: the internal body receives a considerable amount of applications each term, and it takes time to review every single proposal with the resources at the disposal of the university. Yet, submitting prison research projects also raises specific problems that increase the number of reviews before approval.<sup>428</sup>

The overall procedure lasted eight months. It represented an early “emotional challenge” of doing prison research, as it created a situation of uncertainty about whether the application procedure to access prisons in England and in Italy would ever succeed or be completed on time.<sup>429</sup>

Researchers have responsibilities towards colleagues and research participants. They should act honestly and truthfully in every aspect of their work, take responsibility for their decisions, treat colleagues with courtesy and participants with human dignity and respect. In particular, they have “to protect the rights of those they study, their interests, sensitivities and privacy, while recognising the difficulty of balancing potentially conflicting interests.”<sup>430</sup>

Maintaining the integrity of the study can be quite challenging when dealing with the penal system. As described above, to access prisons and recruit participants, it is necessary to interface with different bodies and various people, who often demand different – if not opposite – preconditions to be met in order to talk with

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<sup>427</sup> See Dalen and Jones, n.388.

<sup>428</sup> The nature of my research required detailing all the methodological steps to ensure that my plan was realistic and doable (see following paragraphs). This long-lasting dialogue between the Ethics Committee and the researcher, and between the researcher and the PhD supervisory team was very useful, as it helped me in both reflecting on the specific problems I would have had to address if I wanted to successfully complete this project, and in giving me an example of certain bias we as free public have when thinking of the prison environment.

<sup>429</sup> Jewkes and Wright, n.368.

<sup>430</sup> Socio-legal Studies Association Statement of Principles of Ethical Research Practice 2009, at [[https://www.slsa.ac.uk/images/slsadownloads/ethicalstatement/slsa%20ethics%20statement%20\\_final\\_%5B1%5D.pdf](https://www.slsa.ac.uk/images/slsadownloads/ethicalstatement/slsa%20ethics%20statement%20_final_%5B1%5D.pdf)], accessed 22 February 2019, Principle 6.4.

prisoners and research their experiences. This “negotiation” assumes an especially meaningful connotation when undertaking a queer analysis, including reference to feminist methods of interviewing, as all these methods focus on the power dynamics interconnecting the researcher and their participants. More generally, the researcher should reflect on how to portray their questions and aims authentically, while contextually seeking to meet ethical or institutional bodies’ expectations and requirements, in the aim of obtaining their official approval.<sup>431</sup>

These all proved to be delicate steps, as on one side the researcher wants to access the prison establishment, and tends to tailor their project to meet institutional priorities; on the other hand, it is fundamental to preserve the research methodological integrity, and it is important to understand which compromises are acceptable without jeopardising the honesty and soundness of the project.<sup>432</sup>

The recruitment process represented an issue of particular concern for the Ethics Committee and at subsequent research stages, in relation to the degree of involvement of the prison management. The general recommendation when dealing with sampling participants in sociological research is to avoid third parties coming into possession of sensitive information regarding research participants. However, as observed by various prison researchers, prison studies necessarily call for a balance between the “what is practically possible but still ethically justifiable”, and sometimes Research Ethics Committees demonstrate a limited knowledge of the functioning of places of detention.<sup>433</sup>

The gatekeeping process I engaged in with local prison governors to obtain their preliminary consent and access their establishments was also an occasion to test whether it was possible to sample participants without putting their safety and their privacy at risk. The finalised recruitment process I described in the previous paragraph represents the result of these conversations. Clearly, I would have preferred to be the only one involved in the recruitment process. Yet, prison policies require bending the protocols provided for conducting empirical research to the extent that the fieldwork is actually manageable, especially when the researcher is a PhD student with no previous experience of prison research.

### 3.6.2 Respect for the human dignity of participants

Principle 6 of the SLSA Statement of Principles of Ethical Research Practice acknowledges that socio-legal researchers enter into personal and moral relationships with research participants, and affirms that these

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<sup>431</sup> For instance, during the university ethical approval process, I had to be careful in underlining that I had preliminary contacts with prison governors in the North East area, and with NGOs representatives before them, so as to reassure about the reliability of my network of contacts, yet making it clear that such early talks were not to be considered as part of the data collection, nor that I had already started interviewing participants before having obtained ethical clearance.

<sup>432</sup> Jewkes and Wright, n.368; Alison Liebling, ‘Doing Research in prison: Breaking the Silence?’ (1999), 3 *Theoretical Criminology* 2.

<sup>433</sup> See Dalen and Jones, n.388, at 12; Jewkes and Wright, *ibid.* On the difficult relationship between “balance” “independence” and “objectivity,” see also Liebling, *ibid.*

relationships should be based on trust.<sup>434</sup> This entails a responsibility on the researcher to ensure that “the rights of those they study, their interests, sensitivities and privacy” should be protected.<sup>435</sup>

The interviews involved vulnerable people who live in confinement and do not have the possibility to freely express their intimate desires, or their gender identities.<sup>436</sup>

Concerns were raised by the University Ethics Committee in terms of maintaining participants’ confidentiality and anonymity in a setting where there is a risk that prison staff, or other inmates, may come into possession of sensitive data. Strategies to address these issues are described in the previous section.

Attention was dedicated in the research methodology design to guaranteeing that participants were not exploited during the research process itself, and that the emotional consequences of the research process are not harmful for the interviewees. Emotions generally represent an important component of a qualitative study, yet prison researchers have started focusing on the emotional challenges linked with qualitative prison analysis, both for the researcher and for participants, relatively recently.

In this regard, each participant received exhaustive information about the project, in order for them to undertake a conscious decision if agreeing or not to participating to the study. Additionally, it was made clear that their participation was voluntary and they could decide to withdraw at any time.

The information provided to participants in writing was drafted in simple language, and repeated by the interviewer orally before starting each interview. Moreover, the interview guidance was designed in such a way as to include more sensitive topics of discussions between less emotionally demanding questions. Finally, a debriefing process was designed in order to limit the emotional backlash of the interviewing process for the participants.

Another fundamental topic concerned confidentiality. The use of a recording device was adopted on the basis of literature accounts of prisoners avoiding participation for fear that written signed copies of the consent forms, including personal information about themselves, could be read by the prison staff and used against them, or for a general mistrust of signing any kind of document. It was important to take into account these concerns to reduce prisoners’ uneasiness as much as possible, and to increase data reliability, avoiding the

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<sup>434</sup> Socio-legal Studies Association Statement of Principles of Ethical Research Practice 2009, [[https://www.slsa.ac.uk/images/slsdownloads/ethicalstatement/slsa%20ethics%20statement%20\\_final\\_%5B1%5D.pdf](https://www.slsa.ac.uk/images/slsdownloads/ethicalstatement/slsa%20ethics%20statement%20_final_%5B1%5D.pdf)], accessed 22 February 2019, Principle 6.1 and 6.2.

<sup>435</sup> Ibid, Principle 6.4.

<sup>436</sup> See e.g. Liebling, n.375, at 481-486; Liebling, n.432; Ben Crewe, ‘Not Looking Hard Enough: Masculinity, Emotion, and Prison Research’ (2014), 20 *Qualitative Inquiry* 4, 392-403; Yvonne Jewkes, ‘Autoethnography and emotion as intellectual resources: Doing Prison Research differently’ (2012), 18 *Qualitative Inquiry*, 63-75.

possibility that their answers could be invalidated by respondents' apprehension for possible negative consequences.<sup>437</sup> As mentioned before, not all participants shared this worry.<sup>438</sup>

Finally, the information sheet clarified that each interviewee could decide to not answer any of the questions asked, and to withdraw from the interview at any time, with no need for explanations or fear of negative consequences.

However, respondents' rights and their condition of loss of liberty had to be balance against anonymity and confidentiality. Indeed, it had to be elucidated that in case the interviewee would have shared details about an offence they have committed but have not been prosecuted, or disclosed information on non-prosecuted offences committed by third parties, or if they mentioned that they were at risk of hurting themselves, or someone else was, the researcher would have communicated these details to the prison staff. In spite of the possible negative repercussions in terms of trust and research authenticity, in these circumstances the researcher has to face ethical and legal dilemmas when finalising their methodology which would be perhaps less prominent with adult free individuals.<sup>439</sup>

### 3.6.3 Dialogue with the university ethics committee and lack of focus on the specificities of prison research<sup>440</sup>

The ten-month review process for obtaining the university's ethical approval was certainly useful to define the research methodology and anticipate some of the concerns linked with doing research inside prison. However, it could sometimes be sensed that the Committee was not completely familiar with the specificities of prison research, particularly with all the steps to follow to apply for gaining access to penal estates. This translated into a troublesome prolongation of the application procedure, as certain information was required by the English government through the IRAS application system that should have been originally provided by the university.<sup>441</sup>

Another issue arose with the complexity of the content of the information sheet and of the sentences to confirm participants' informed consent. On one hand, the review process proved to be quite useful, as it helped in

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<sup>437</sup> Regarding alternatives to signed consent forms, see Roberts and Indermaur, n.405, at 289-299. On the excessive complexity of informed consent forms, see James R P Ogloff & Randy K Otto, 'Are Research Participants Truly Informed? Readability of Informed Consent Forms Used in Research' (1991), 1 Ethics and Behaviour 4, 239-252.

<sup>438</sup> The use of a recording device was not always easily accepted by prison authorities. Despite getting clearance from the National Prison Service in Italy, and the HMPPS in England and Wales, I often had to be subjected to additional controls from prison guards, or to show said authorisation multiple times during my visits, which led to long waits and delays in the data collection process.

<sup>439</sup> Fortunately, for many participants the interview represented a positive change to the ordinary routine of prison life, and a chance to talk with someone about personal feelings and opinions about their daily lives. The project thus resulted in an emotionally rewarding experience.

<sup>440</sup> This Section refers to the ethics approval procedure in force at the time of my application (2016-2017). Northumbria University has later developed an online application system which provides different instructions.

<sup>441</sup> For instance, the application to Her Majesty's Prison and Probation Service to be submitted online through the IRAS system must include the University Ethics Committee reference number, and the University Data Protection Notification number, which were not initially provided at the internal ethics approval stage.

tailoring the text in order to facilitate prisoners' comprehension, as over complicated sentencing was deleted, especially if including excessively specialised legal terminology. On the other, it showed a certain bias on behalf of the reviewers concerning the ability of prisoners to understand a more complex text. Even if deficits on the literacy and mathematical skills of inmates hosted in English prisons have been reported,<sup>442</sup> this should not lead to categorising all the prison population as one illiterate monolithic category, without considering their different backgrounds. The general public tends to treat inmates as one monolithic category, which is also why qualitative studies are important to shed light on the layer of invisibility surrounding the prison institution.

Questions arose also in relation to getting audio-recorded consent from the interviewees before starting the interview. This was perceived as risky for the researcher and the participants. Therefore, it was necessary to highlight the specificity of prison research as compared to other areas of empirical inquiry, in terms of protecting participants' confidentiality and anonymity; also, it is well suited with the previously mentioned concern on prisoners' literacy to ask them to verbalise their consent instead of signing a form.

More generally, researching vulnerable or risky populations requires some degree of flexibility instead of adopting a "one size fits all framework".<sup>443</sup> Even in this circumstance, it would probably be helpful to have prison research project assessed by professionals who have had experiences in studying or working within the CJS.

### 3.7 An emotional rollercoaster: the prison researcher as intermediary among different actors and their respective interests

I hope this account of the stages that were needed to be in what is usually a bare room, with a couple of chairs and a table, waiting for minutes – sometimes hours – for each participant to receive permission to come and share their experiences of prison life, shows the deep unpredictability, and ultimately humanity, intrinsic to prison research.

As a first-time prison researcher, I have quickly realised that the normative power exercised by the prison environment extends not only to residents of the penal institution, but also to people and organisations who come to interact with such power. Of course, a researcher is an external subject to the carceral state who is not serving a sentence, yet the tendency towards impenetrability from the outside characterising the prison system,

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<sup>442</sup> See Department for Education and Skills Funding Agency, Information on education and training by participation and achievements, including offender learning, at [<https://www.gov.uk/government/statistical-data-sets/fe-data-library-education-and-training>], accessed 25 October 2017. No information is available for Italy in this respect.

<sup>443</sup> Jewkes and Wright, n.368, at 666; Ruth Armstrong, Loraine Gelsthorpe, Ben Crewe B., 'From Paper Ethics to real-world research: Supervising ethical reflexivity when taking risks in research with "the risky,"' in Karen Lumsden and Aaron Winter eds., *Reflexivity in Criminological Research: Experiences with the Powerful and the Powerless* (Houndmills: Palgrave Macmillan 2014), 207-219.

along with a normative dynamic grounded on exercising control on every aspect of imprisonment, had emotional implications on the planning and development of the research project.<sup>444</sup>

As described above, the barriers of access start from the lengthy procedure to obtain clearance from prison authorities.<sup>445</sup> This can be characterised by tight deadlines followed by unspecified periods of waiting. Some of the questions posed during the application process seemed more tailored for quantitative rather than qualitative studies,<sup>446</sup> while some others were asked several times,<sup>447</sup> or were hardly answerable from a researcher's perspective.<sup>448</sup> The application procedure is very much oriented towards measurable outcomes, whereas qualitative research entails acquiring knowledge that is not always quantifiable.<sup>449</sup>

This became problematic particularly within the English context, where some of the prison management I had met at the beginning of my research were not fulfilling the same positions, or had been substituted by other officials, by the time I obtained the necessary authorisations. This made it difficult to maintain a bond of trust with research gatekeepers.<sup>450</sup>

More informal barriers had to be faced later on at each prison access. The Foucauldian conceptualisation of power and surveillance<sup>451</sup> does not apply uniformly – and with the same characteristics – in every institution. The literature describes how the prison structure complicates outsiders' integration within the system, who on the contrary tend to be perceived as exogenous elements.<sup>452</sup>

Indeed, each prison required a re-positioning of my role as a researcher to adapt myself to different normative frameworks. This translated into both minor and major challenges, as illustrated in this chapter. I could not be sure of whether the prison workers I was talking to were sympathetic towards my study; even so, I did not know what level of training to expect from them on issues of sexuality and gender identity, or what kind of

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<sup>444</sup> More experienced researchers than the author had explored the role of emotions in conducting prison research, particularly in relation to qualitative studies: see e.g. Liebling, n.375; Keramet Reiter, 'Making windows in walls: Strategies for prison research' (2014), 20 *Qualitative Inquiry*, 414-425; Jewkes, n.436.

<sup>445</sup> The literature has described the time consuming lengthy process to get free access in the field, and how it involves convincing various gatekeepers of the purpose of the research and of the legitimacy of the researcher: see e.g. Kristel Beyens and others, 'The Craft of Doing Qualitative Research in Prisons' (2015), 4 *International Journal for Crime, Justice and Social Democracy* 1, 66-78; Jewkes and Wright, n.368; Crewe, n.368; Abigail Rowe, 'Situating the self in prison research: Power, identity, and epistemology' (2014), 20 *Qualitative Inquiry* 4, 464-476.

<sup>446</sup> During the application process in England and Wales, the researcher was asked to predict precisely how many participants would have been interviewed by the end of data collection, and how many for each category, which was impossible to determine before completing the recruitment process designed for this study.

<sup>447</sup> For instance, the Research Committee for England and Wales repeatedly asked for provision of further details on the method to recruit participants: this was done by basically reiterating the same question, thus triggering similar answers from the researcher. Ultimately, it was not clear what kind of additional information was required, yet this contributed to delay the data collection phase.

<sup>448</sup> For instance, I was asked to specify what steps I should take to ensure my own safety inside prison, which seemed a puzzling question to me, considering the high level of security and surveillance that should be provided within penal institutions, and the limited autonomy generally granted to a visiting researcher. This also triggered some concerns on my behalf on the level of security ensured in the prisons I was going to visit.

<sup>449</sup> Liebling, n.375, at 485. Alison Liebling, 'Whose side are we on? Theory, practice and allegiances in prisons research [Special issue]' (2001), 41 *British Journal of Criminology*, 472-484.

<sup>450</sup> Liebling, n.375.

<sup>451</sup> Foucault, n.5.

<sup>452</sup> Beyens and others, n.445, at 66-78. Mary Bosworth, *Engendering Resistance: Agency and Power in Women's Prisons* (Aldershot: Dartmouth 1999).



relationships they had developed with the participants to the study. I had thus to be careful of the level of information I should provide about my project, and how to present it accurately, yet in a way to gain their trust.

The same applied to prison guards: some were very patient with me, and let me continue the interviews well beyond the prescribed time limits, showing an understanding of the potential benefits of this study to the interviewees. Contrarily, in other circumstances keeping the discussion flow proved to be difficult, due to the frequent interruptions from staff: I suspect that some of these were not necessarily related to security concerns, but on the guards' fear of "losing control" over prison residents' actions and narratives.<sup>453</sup>

I found myself adopting a similar approach as other fieldworkers, by introducing myself as a "naïf PhD student" ready to learn from more experienced prison actors, and then assuming a more competent role once these actors became familiar with my presence.<sup>454</sup> However, this was not always the case: some operators expressed genuine interest in my views and asked if they could read the research outcomes at the end of the project, demonstrating openness to the topic and giving me credit as researcher from the first meeting. Nonetheless, I kept receiving questions about my professional background, or about the methods I used for data collection, although they would usually stop doing that after seeing me more times.<sup>455</sup>

Reaching my point of contact and scheduling visits has often been problematic. On one occasion, I arranged a prison access to complete all interviews in one prison, and then found out that my contact was not working on that day and no one else was aware of my arrival. After driving for a hundred kilometres, I had to return home and arrange another appointment.

All these episodes frustrated me, as they made me feel that I was not in control of my own project, despite the time dedicated to developing a rigorous methodology. However, I slowly learnt to be patient the more these accidents would take place. Besides, they often became to origin of unexpected opportunities: in the example above, I ended up meeting the prison governor, contrarily to the original plan, who provided me with very useful information on that prison organisation that helped me greatly in contextualising participants' narratives during the interviews.

Dynamics of power played an important role also in my relationship with participants. The interaction with them triggered issues of trust and understanding to analyse and report their narratives accurately and authentically. As observed by Liebling, configurations of powers can emerge unexpectedly and involve "different levels of authority."<sup>456</sup> Conducting interviews in Italy and in England determined the emergence of different interactions due to cultural and linguistic factors. Just to mention one example, Italian participants tended to be more talkative, while interviews conducted in England ended up being on average slightly shorter. Although this depended also on the time allocated by the prison management for each interview (to confirm

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<sup>453</sup> For instance, in at least one episode a prison guard dismissed trans prisoners' attitude as a form of "showing off," dismissing the possibility that their complaints could be justified.

<sup>454</sup> Tournel as cited by Beyens and others, n.445.

<sup>455</sup> Kennes accounted for similar experiences, as cited by Beyens and others, n.445, at 69.

<sup>456</sup> Liebling, n.375, at 482.

the effects of the prison normative framework on the realisation of the research data collection), I believe that being an Italian native speaker probably played a role in the way the interviewees approached me (and vice versa), as well as in my understanding of their narratives. Moreover, factors such as the age, sexual orientation, gender, ethnicity, nationality, class, professional qualifications and other personal characteristics cannot be ignored.<sup>457</sup>

Each interview raised different emotions and had an impact on data gathering.<sup>458</sup> I was not expecting, for example, to see signs of self-harm on the wrists of some of the interviewees; I listened to accounts of episodes of sexual harassment or sexual violence which were told me while answering apparently unrelated questions; I saw participants getting emotional while talking about their life before prison, or about their visits with the family. Topics that would be deemed light or more neutral in the world outside can acquire a completely new significance when a person is deprived of their liberty. These represent a few examples of how personal contacts, even if brief, can affect the researcher's sensitivity, not only during fieldwork, but also when listening to the interview recordings and analysing the data. After each dialogue, I often found it necessary to take some time to re-orientate myself within the space I usually inhabit and share these experiences with others.

The emotional implications of prison research raised questions on ways to analyse data by balancing various perspectives: the personal accounts of prison residents, and the assumptions I had towards them; the fragmented representation of the prison environment, which I only partially accessed; the interactions with prison professionals, which were not part of the research sample, yet they offered a different interpretation of certain dynamics. Assumptions on my (mis)understandings of gender and sexuality also needed to be explored, as described above in this chapter.

Though there is no easy solution to these problems, I hope that this work can contribute to stimulate further discussion on these "humane" aspects of prison, and perhaps more generally social science research.

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<sup>457</sup> Id.

<sup>458</sup> On the emotional investment of the researcher in this context, see e.g. Jewkes and Wright, n.368, at 659-676; Jewkes, n.436.

## Chapter 4

# International human rights law and the construction of the homosexual and transgender subject in the context of prison

### 4.1 Introduction

The internalisation of human rights principles within the prison context represents a critical process for the acknowledgment and protection of LGBTQ inmates. This chapter explores how international institutions, in particular the UN and the CoE, have shaped the notion of sexuality and gender identity, in order to understand the effects and limits of the process of integration of these concepts within domestic jurisdictions. It analyses the strategies of construction of the international homosexual and transgender subject, and focuses on more recent attempts to re-configure established categories in light of a growing awareness of sexual and gender diversity.<sup>459</sup>

Reference to the UN includes the work of political and treaty monitoring bodies, with specific consideration to the mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (IESOGI),<sup>460</sup> and to the *soft law* standards provided with the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics (YP).<sup>461</sup>

The CoE system introduced important provisions for the life of LGBTQ prisoners, particularly with the case law of the ECtHR and the Recommendations of the Committee of Ministers (CoM).<sup>462</sup>

### 4.2 The development of a norm on SOGIESC at the UN

UN and NGO reports have confirmed on several occasions that LGBTQ people in imprisonment suffer from

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<sup>459</sup> See Damian Gonzales-Salzberg, n.119, 1-25; Otto, n.105.

<sup>460</sup> The IESOGI is appointed by the UN Human Rights Council. His mandate is detailed by Resolution 32/2. See Human Rights Council, *Protection against violence and discrimination based on sexual orientation and gender identity*, A/HRC/RES/32/2, 15 July 2016.

<sup>461</sup> Yogyakarta Principles, n.152. In 2017, the Yogyakarta Principles were reviewed by a panel of experts ten years after their initial adoption. The experts complemented the original Principles with additional provisions that took into account the developments in international human rights law, and sought to adopt an intersectional approach to the issues of sexual orientation, gender identity and expression.

<sup>462</sup> The European Union human rights system is not considered in this thesis. Although the Court of Justice of the European Union and EU secondary legislation contains LGBTQ-inclusive provisions, they only tangentially address questions concerning prisoners' rights.

various forms of discrimination and abuse.<sup>463</sup> The question is whether such human rights violations can be tackled by adopting an international norm on SOGI, and in that case, the degree of acceptance of such a norm by member States.

The – far from being fully accomplished – departure from a normative paradigm solely based on the conceptualisation of non-heterosexual non-cisgender subjects as “the other” in international human rights law on imprisonment follows the evolution of strategies to legally recognise SOGI as protected grounds from discrimination at the international level. Protection of sexual orientation has been achieved through the extensive interpretation of the prohibition of torture and other forms of inhuman or degrading treatment;<sup>464</sup> the right to privacy; and the non-discrimination principle,<sup>465</sup> while respect for human dignity represents an overarching principle justifying the inclusive interpretation of all the above-mentioned human rights.<sup>466</sup>

These standards find their roots in the Universal Declaration of Human Rights. Norms such as the principle of human dignity and the prohibition of torture have acquired the status of customary international law and have been accepted as mandatory provisions by the international community.<sup>467</sup> The work of UN organs, and initiatives such as the adoption of the YP contributed to consolidating the international protection of SOGI.

It is important to clarify what paradigm underpins the concept of universality, and what are the boundaries within which SOGI has been framed. Such a process started with *Toonen v Australia*, where the Human Rights Committee (HRCComm)<sup>468</sup> established for the first time that the notion of “sex” under the International

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<sup>463</sup> UNODC, n.10; SRT, A/HRC/31/57, n.160; UNGA, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, A/HRC/35/36 (19 April 2017); The Association for the Prevention of Torture, n.10, at 22-23.

<sup>464</sup> Human Rights Committee (HRCComm), Namibia – Concluding Observations, CCPR/C/NAM/CO/2 (8-9 March 2016), par. 21. Committee Against Torture (CAT), Armenia – Concluding Observations, CAT/C/ARM/CO/4 (23-24 November 2016), par. 31. The CAT recommended Tajikistan to condemn acts of torture and abuse against LGBTI people, in particular when committed by public officials, and investigate and prosecute such crimes. CAT, United States of America – Concluding Observations, CAT/C/USA/CO/ (2 July 2006), par. 32. Report of the Special Representative of the Secretary-General on the situation of human rights defenders, Ecuador E/CN.4/2005/101 (13 December 2004) (torture, ill-treatment).

<sup>465</sup> See e.g. See United Nations Human Rights, Office of the High Commissioner, *Born Free and Equal - Sexual Orientation and Gender Identity in International Human Rights Law*, HR/PUB/12/06, 2012.

<sup>466</sup> See e.g. HRCComm, Morocco-Concluding Observations CCPR/C/MAR/CO/6 (24-25 October 2016), par. 12. Committee for the Elimination of Discrimination Against Women (CEDAW), Albania – Concluding Observations, CEDAW/C/ALB/CO/4 (12 July 2016), par. 38. Denis Abels, *Prisoners of the International Community* (The Hague: T.M.C. Asser Press, 2012).

<sup>467</sup> Daniel Moekli and others, *International Human Rights Law* (Oxford University Press, Usa; 2 edition 2014), at 160-161; Abels, *ibid*, at 16-17. After recognizing that all human beings have inherent dignity and enjoy equal rights (Preamble), the UDHR affirms important rights for people deprived of their liberty, such as the principle of equality and non-discrimination (Art. 2 and 7), the right to life, liberty and security of the person (Art. 3), the prohibition of torture and cruel, inhuman or degrading treatment or punishment (Art. 5), and the prohibition of arbitrary detention (Art. 10). Similarly, provisions concerning the right to be free from arbitrary interference of privacy, family or correspondence (Art. 12) or the right to marry and to found a family (Art. 16) are of interest for people in confinement.

<sup>468</sup> Optional Protocol to the International Covenant on Civil and Political Rights, General Assembly Resolution 2200A (XXI) 16 December 1966 entry into force 23 March 1976. UN organs present different degrees of politicisation. SOGI issues were initially addressed by UN treaty bodies, such as the Human Rights Committee, which are established by UN treaties provisions. They are committees of independent experts that monitor the implementation of the core international human rights treaties. These bodies are apolitical. There are nine core international human rights instruments, each of these establishing a Committee of experts monitoring their implementation: the ICERD (International Convention on the Elimination of All Forms of Racial Discrimination); the ICCPR (International Covenant on Civil and Political Rights);

Covenant on Civil and Political Rights (ICCPR) shall be interpreted as to include “sexual orientation.”<sup>469</sup>

The respondent State legislation criminalising same-sex sexual conducts was also found in violation of the right to privacy under Art. 17 ICCPR,<sup>470</sup> as this leaves no discretion to the States to enact restrictions to private life based on moral considerations.<sup>471</sup> Although the Committee did not consider whether a national law criminalising same-sex sexual acts between men was in violation of the principle of equal protection of the law, there is a link between the right to decide how to shape one’s identity without interference and the substantial right to be treated equally to heterosexual people in the exercise of this same choice.<sup>472</sup>

However, *Toonen* also exemplified the essentialism characterising the human rights discourse. The Committee did not explain why sexual orientation – a fluid, relational experience of attraction and emotion – should be protected on the grounds of sex discrimination – a biological fixed notion – instead of “other status” under Art. 26 ICCPR.<sup>473</sup> The conflation between sex and sexual orientation has serious consequences: the fieldwork findings will show that it contributes to the mistreatment and marginalisation of LGBTQ prison minorities.

Framing the recognition of sexual orientation (and gender identity) in relation to the right to privacy can be problematic when it comes to protecting LGBTQ people in public spaces such as prisons. Since the *Toonen* decision, privacy has been constructed – when regarding gender and sexuality – as the right to control how others perceive ourselves. In the context of prison, there remains a space of personal choice – although highly restricted – that could represent a site of empowerment for prisoners, yet an approach based on privacy risks conflating equality considerations within the privacy framework. While substantial equality corresponds to exercising one’s rights without being treated differently, the right to privacy relies more on the individual expression of freedom of choice. Thus, these concepts are connected,<sup>474</sup> as limitations to privacy based on individuals’ personal characteristics may constitute the gateway to discrimination. An argument based on the right to privacy alone risks overlooking the discriminatory roots of limiting the freedom of choice of a subject belonging to a minority group, leading to unfair treatment such as in the case of LGBTQ inmates who are at risk of receiving disciplinary sanctions even for manifesting forms of intimacy which do not have a sexual

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the ICESCR (International Covenant on Economic, Social and Cultural Rights); the CEDAW (Convention on the Elimination of All Forms of Discrimination against Women); the CAT (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment); the CRC (Convention on the Rights of the Child); the ICMW (International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families); the CPED (International Convention for the Protection of All Persons from Enforced Disappearance); and the CRPD (Convention on the Rights of Persons with Disabilities). See

[<https://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx>], accessed 12 September 2019.

<sup>469</sup> See HRCComm, *Toonen v Australia*, CCPR/C/50/D/488/1992, 4 April 1994 (*Toonen v Australia*). The ICCPR regulates non-discrimination at Art. 2 and 26.

<sup>470</sup> Ibid, par. 8.1 - 11.

<sup>471</sup> Ibid, par. 8.6.

<sup>472</sup> Charilaos Nikolaidis, ‘Unravelling the Knot of Equality and Privacy in the European Court of Human Rights and the US Supreme Court: From Isonomia to Isotimia’ (2018), 18 Human Rights Law Review, 719–744, at 733–734.

<sup>473</sup> Douglas Sanders, ‘Human Rights and Sexual Orientation in International Law’ (2002), 25 International Journal of Public Administration 1. Dominic McGoldrick, *The Development and Status of Sexual Orientation Discrimination under International Human Rights Law* (2016), 16 Human Rights Law Review 4, 628–631.

<sup>474</sup> Nikolaidis, n.472, at 733–734.

connotation.<sup>475</sup> The context where these human rights principles are applied is particularly relevant here, recalling Tahmindjis' notion of functional symbiosis between the universal and the local.<sup>476</sup>

After *Toonen*, UN bodies have adopted a view of sexual orientation as different from biological sex, acknowledging that it represents a different protected ground of non-discrimination.<sup>477</sup> UN sources developed a more inclusive language due to the "mainstreaming" and consolidation of SOGI-related rights, consisting of slowly including different expressions of sexuality and gender (identity) in their legal documents, reports and official statements.<sup>478</sup> They have attempted to construct a SOGI norm based on the principle of equality and non-discrimination, while widening the number of issues that included SOGI. Besides continuous calls for decriminalisation of same-sex sexual conduct in private, UN organs have prioritised the most serious human rights violations, such as (sexual) violence and discriminatory abuses based on SOGI. Yet, they constructed the homosexual and transgender subject on the assumption that sexuality (and its relation with gender) is primarily connoted by violence, thus leaving the heteronormative basis of the system unchallenged, as well as its legal normalising power.<sup>479</sup>

This approach continues "othering" non-heterosexual, non-cisgender identities, thus re-creating an oppositional binary scheme that ultimately perpetuates normative inequality and negative human rights protection, rather than promoting active obligations challenging State power. Similar to the way women were depicted in opposition to the male subject,<sup>480</sup> LGBT people have been generally portrayed as victims affected by problems that did not concern the heterosexual male.<sup>481</sup>

Transgender people have been especially penalised by this paradigm. Gender identity and other forms of gender expressions have been rarely contemplated by UN bodies:<sup>482</sup> gender identity has been recognised as a

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<sup>475</sup> Id.

<sup>476</sup> Tahmindjis, n.176.

<sup>477</sup> HRCComm, *Young v Australia*, CCPR/C/78/D/941/2000, 18 September 2003; HRCComm, *X v Colombia*, CCPR/C/89/D/1361/2005, 30 March 2007. See also HRCComm, General Comment N°35 - Article 9: Liberty and Security of person, CCPR/C/GC/35 (23 October 2014), par. 3.

<sup>478</sup> The emergence of a norm on SOGI has also been facilitated by the dialogue between UN and regional institutions, such as the Council of Europe and the Inter-American system. See Sanders, n.473; Michael O'Flaherty, 'Sexual orientation and gender identity', in *International Human Rights Law*, Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran eds. (3<sup>rd</sup> edition, Oxford University Press, 2017).

<sup>479</sup> Baisley, n.112, at 136; Diane Otto, 'Between Pleasure and Danger: Lesbian Human Rights' (2014), 6 *European Human Rights Law Review*, 618-628; Wayne Morgan, 'Queering International Human Rights Law', in Carl Stychin & Didi Herman eds., *Sexuality in the Legal Arena* (Athlone 2000), 208 - 225.

<sup>480</sup> See Grigolo, n.105; Otto, n.104. Dianne Otto further observes the intersectional implications of the ways female sexuality is treated at the international level, with a tendency to marginalise lesbian experiences and their specific histories of pleasure and pain. The same use of the term lesbian may result exclusionary if it is not interpreted to consider the complexity of the links between lesbian advocacy for sexual freedom and "those of all women and of other sexual and gender minorities." See Otto, n.479, at 619.

<sup>481</sup> For instance, Sivakumaran analysed how rape as an international crime has been represented in international law as a form of violence that does not affect men. Sandesh Sivakumaran, 'Lost in Translation: UN responses to sexual violence against men and boys in situations of armed conflict' (2010), 92 *International Review of the Red Cross* 877. For a general overview of citing SOGI and LGBT people at the UN, see e.g. Sanders, n.473; Saiz, n.144.

<sup>482</sup> See Committee on Economic, Social and Cultural Rights (CESR), General Comment No 14. The Right to the Highest Attainable Standard of Health (Art. 12), UN Doc E/C.12/2000/4 (11 August 2000): Article 2(2) of the ICESCR prescribes discrimination on the basis of sexual orientation; the UN CEDAW has called for the decriminalization of lesbianism: CEDAW, General Recommendation No. 24: Article 12 of the Convention (Women and Health) CEDAW/A/54/38 (27

protected ground only since 2011.<sup>483</sup> International human rights law has operated a conflation between sex and sexual orientation, but also between sex and gender. These have intersected with each other: although the language of gender as a social construct entered the human rights discourse during the 1990s, the feminist and queer movement have struggled to “question the male/female dualism and biological base of the sex/gender orthodoxy.”<sup>484</sup> Thus, the transgender subject has suffered from a double form of invisibility.<sup>485</sup>

The process of “othering” presents intersectional connotations and interlinks with assimilationist practices which led LGBT groups advocating for rights that can be “acceptable” to the heterosexual majority, such as the legal recognition of same-sex relationships, at the expense of marginalised queer communities (e.g. prisoners, people of colour and/or struggling economically, trans individuals).<sup>486</sup> The YP represented an attempt to go beyond the establishment of a SOGI norm exclusively based on privacy and non-discrimination, with mixed results.

### 4.3 Harmonising the SOGI norm: The Yogyakarta Principles

The SOGI norm resulting from UN organs’ activity has remained fragmented and not fully representative either of the complexity of identities and behaviours characterising queer individuals, or of the wider spectrum of issues characterising their lives. In other words, the SOGI norm did not fully disrupt the heteronormative gender binary paradigm.<sup>487</sup>

An important attempt to organise this fragmented pattern saw a panel of experts drafting the YP in 2006. They reviewed existing international human rights standards in light of SOGI, looking at the universal principles of the International Bill of Rights,<sup>488</sup> and contributed to crystallising States’ obligations drawn from existing international principles.<sup>489</sup>

This incremental approach strategy has been described as conservative yet aimed at inclusivity, dictated by the strong opposition to LGBT rights manifested by a considerable number of States at the UN; this reflects a

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January 1999). The UN Committee against Torture issued declarations criticizing states for prison conditions that discriminate based on sexual orientation. See CAT, Egypt-Concluding Observations, CAT/C/CR/29/4 (23 December 2002).

<sup>483</sup> On the convergence between sexual orientation and gender identity, see e.g. Jena McGill, ‘SOGI . . . So What? Sexual Orientation, Gender Identity and Human Rights Discourse at the United Nations’ (2014) 3 Canadian J of Human Rights 1, 23–25.

<sup>484</sup> Otto, n.104, at 300.

<sup>485</sup> On the convergence between sexual orientation and gender identity, see e.g. McGill, n.483.

<sup>486</sup> Duggan, n.100.

<sup>487</sup> As will be made clearer when discussing the work of the Human Rights Council, such fragmentation depends also on the continuing resistance from many UN States towards any forms of recognition of LGTQ rights. In 2018, 70 UN Member States still criminalised same-sex conducts through legislation. Decriminalisation of homosexuality remains a fundamental step to ensure that subsequent progress towards full equality for LGBTQ people can be achieved.

<sup>488</sup> O’Flaherty and Fisher, n.118; O’Flaherty, n.104.

<sup>489</sup> Yogyakarta Principles, n.152.

similar tactic used by feminist advocacy groups to “mainstream” gender.<sup>490</sup> The criticised conservatism of the operation is tempered by the fact that the YP are not static, as the experts who drafted the first Principles have agreed to review and update them periodically (the first review took place ten years after, giving rise to the YP+10).<sup>491</sup>

The first version of the YP presented definitions of SOGI that sought to capture the multiple aspects of either phenomenon. Sexual orientation was defined:

*“Each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.”*

While gender identity was described:

*“Each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.”*<sup>492</sup>

The YP+10 took into account some of the criticisms addressed to the original YP, particularly the fact that gender identity was treated as an intersectional element of discrimination in relation to gender,<sup>493</sup> thus maintaining a distinction between stable sex and gender, biology and social construction. Consequently, States’ obligations within the YP excluded cisgender individuals or people with more fluid gender identities.<sup>494</sup>

The YP+10 now includes a definition of gender expression that elaborates on the notion of “other expressions of gender”:

*“Each person’s presentation of the person’s gender through physical appearance – including dress, hairstyles, accessories, cosmetics – and mannerisms, speech, behavioural patterns, names and personal references, and noting further that gender expression may or may not conform to a person’s gender identity and sex characteristics: each person’s physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty.”*

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<sup>490</sup> Otto n.104; n.105.

<sup>491</sup> See the Yogyakarta Principles, n.152, Preamble; O’Flaherty, n.104. The last review took place in 2017: see The Yogyakarta Principles plus 10 (YP+10), Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles, [<http://yogyakartaprinciples.org/>], accessed 9 May 2019.

<sup>492</sup> YP, n.152, Preamble.

<sup>493</sup> Otto, n.104; Waites, n.112; Gross observes that the definitions of SOGI as framed in the YP are still based on the idea that someone’s sexual orientation depends on the similarity between oneself and the object of desire, while both definitions presuppose to adhere to a sex/gender scheme, where gender identity is somehow categorised. See Gross, n.104, at 249-250; Dreyfus, n.104.

<sup>494</sup> Otto, *ibid*; Dreyfus, *ibid*.



O’Flaherty observes that compromises in the drafting of the YP were necessary to find a common agreement and ensure their effective implementation: “to be effective, their efforts should be grounded in a strong and clear normative base in the form of IHRL that is capable of and understood to apply for the full protection of the rights of members of sexual minorities.”<sup>495</sup>

The YP have been perceived by some as an initiative designed to fit sexual orientation, gender identity and gender expressions within existing standards without questioning the underlying essentialist heteronormative framework.<sup>496</sup> The YP+10 have sought to overcome the perpetuation of “othering” dynamics<sup>497</sup> by affirming that the Principles apply in case of “actual or perceived” SOGI or gender expressions or sex characteristics. It is the author’s opinion that the inclusion of a more comprehensive definition of SOGIESC, along with the continuous reference to the universality of each principle,<sup>498</sup> addressed at least the latter concern, and helped to consolidate a definition of sexual orientation that goes beyond the mere freedom to exercise same-sex acts in private.

Nevertheless, it cannot be ignored that the more inclusive definitions introduced by the YP and YP+10 have not been reflected either in the English and Italian legislation on equality, nor on prison minorities, as national institutions have opted for a different terminology; this raises questions on their success in influencing societal recognition for all LGBTQ people in these countries.

In spite of YP limitations, the use of SOGI, and later on of SOGIESC, as definitional terms offered the scope to go beyond the acronym LGBT<sup>499</sup> and helped in propelling the gender dimension of human rights issues in a more inclusive way at the UN,<sup>500</sup> with more and more frequent citations of the Principles.<sup>501</sup>

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<sup>495</sup> O’Flaherty, n.104, at 283.

<sup>496</sup> Otto, n.104; Waites, n.112.

<sup>497</sup> Grigolo, n.105.

<sup>498</sup> Mainly by the use of the term “everyone” at the beginning of almost all Principles. Nevertheless, from a queer perspective the concept of universality of human rights is not ‘universal’ at all, as it ultimately supports a “particular” representation of the legal subject, which presents gendered, heteronormative and neo-liberal characteristics. See e.g. Otto, n.104; Grigolo, n.105; Kapur, n.105; Gonzales-Salzberg, n.78. From a more feminist-oriented perspective, Catherine MacKinnon was among the first scholars of international law to develop a critique of the masculinity of law, underlining the marginalisation of the woman subject: see e.g. MacKinnon, n.38, 161-2: ‘The state is male in the feminist sense. The law sees and treats women the way men see and treat women.’ Joanne Conaghan acknowledges that law sometimes creates opportunities for women, but she cites Carol Smart’s arguments in *Feminism and the Power of Law* when noticing that the law develops unevenly and not always consistently in relation to the interests it supports: ‘If law can be said to favour one particular group more than others, whether in terms of distributive outcomes or general standpoint, it is probably white, middle-class, heterosexual, able-bodied men who are favoured, but to acknowledge this is far from establishing that law is resolutely and unconditionally male.’ See Joanne Conaghan, n.40, at 76.

<sup>499</sup> Id.

<sup>500</sup> See e.g. UNGA, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/64/2011 (3 August 2009), on the links between gender, counter-terrorism and detention, including the situation of LGBT people.

<sup>501</sup> See e.g. UNGA, Statement on Human Rights, Sexual Orientation and Gender Identity, (18 December 2008), at [<http://www.refworld.org/docid/49997ae312.html>], accessed 13 December 2019. For other examples, see O’Flaherty, n.104, at 289 and following. The Universal Periodic Review (UPR), a Human Rights Council (HRC) mechanism where States engage into a peer-to-peer human rights review, have increasingly cited them, or used the language of SOGI when introducing proposals on the topic of sexuality and gender diversity. See UPR, Statistics of Recommendations, at [<https://www.upr-info.org/database/statistics/>], accessed 17 July 2018.

Principles relevant to LGBTQ persons deprived of their liberty flesh out obligations States should comply with under existing IHRL. In particular, Principle 9 regards explicitly the right to treatment with humanity while in detention and confirms that the notion of human dignity under the ICCPR<sup>502</sup> includes also SOGI (and gender expression and sex characteristics as clarified in the YP+10). It focuses on placement policies, which should avoid marginalisation and subjecting prisoners to risk of violence and mental or sexual abuse, and calls for States to ensure that inmates have a say in these choices. It also stresses the importance of introducing protective measures for these minorities, and of guaranteeing proper staff training on human rights standards on equality and non-discrimination in relation to SOGI. Regarding transgender prisoners, Principle 9 recommends allowing prisoners to continue gender-reaffirming treatment and to ensure their medical care.

While crucial to consolidate UN jurisprudence on the principle of non-discrimination and human dignity applied to sexual and gender minorities, the YP show that the criticism of the international human rights approach to sexual and gender diversity during imprisonment is justified: there is a lack of consideration on the intersectional issues regarding LGBTQ inmates (e.g. migrant convicted inmates; LGBTQ inmates who are also people of colour, and so on) while SOGI are entrenched in stability (e.g. the experiences and concerns of transgender people MTF can be quite different to the ones of transgender prisoners FTM); finally, there is no room for supporting potentially positive aspects of LGBTQ prisoners' lives. The YP do not address the issue of social visitation programmes, but only focus on conjugal visits,<sup>503</sup> stating that they should be equally guaranteed both to different-sex and same-sex couples.<sup>504</sup> If the YP scope is to celebrate humanity within SOGI, the importance of adopting policies regulating relationships to fully enact human rights should not be undervalued as well as a more general reflection of the compatibility of blanket bans on sexual conducts and intimacy in prison with fundamental human rights.

It is important to underline the YP outcomes and margins for improvement, as they can offer guidance on interpreting the data collected in England and Italy. Both jurisdictions have only started addressing – to different degrees – some of the issues raised under Principle 9, while their public authorities have similarly ignored the plural dimensions of LGBTQ people's prison experience.

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<sup>502</sup> Art. 10 states: “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” Art. 10 ICCPR is particularly relevant to the treatment of prisoners, ensuring that States enact in national penitentiary policies all human rights, not only those strictly related to the prison environment. See also HRCComm, General Comment No.21, n.158, par. 3: “Article 10, paragraph 1, imposes on States parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty, and complements the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in Article 7 of the Covenant. Thus (...) persons deprived of their liberty (...) may [not] be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment.”

<sup>503</sup> Private meetings between partners without prison authorities' surveillance.

<sup>504</sup> YP, Principle 9 (e). See also CAT, Paraguay. Concluding Observations, CAT/C/PRY/CO/4-6, 14 December 2011, par. 19.

## 4.4 Universalising the protection of SOGI-related rights at the Human Rights Council

The process of emergence of a norm on SOGI progressed significantly at the UN Human Rights Council,<sup>505</sup> which adopted a Resolution on “Human rights, sexual orientation and gender identity” in 2011, later renewed in 2014 and 2016.<sup>506</sup>

The Council has become increasingly important as a “highly contested normative space,” to use Finnemore and Sikkink’s words.<sup>507</sup>

Indeed, the Council’s statements and resolutions have a considerable impact within Member States, and as a consequence for their respective citizens, thus resulting in them being more politically impactful than other UN organs’ legal instruments. As a highly politicised body,<sup>508</sup> it can encapsulate moments of contestation that may be more diluted elsewhere at the UN. That is why SOGI issues have been highly debated at the Council, in a clash representing the “cultural wars” between more secular universal values and moral and religious grounds.<sup>509</sup> This has limited the Council’s ability to challenge heteronormative paradigms beyond general statements relying on an assimilationist approach.

For instance, the first two Resolutions gave the High Commissioner for Human Rights (HCommHR) a mandate to issue a report describing the global status of LGBT individuals, proposing actions to promote human rights compliance.<sup>510</sup> Regarding LGBTQ prisoners, the HCommHR continued using fixed categories to identify the queer prison population and did not build up on the recommendations included in the YP. Nevertheless, it significantly called for law enforcement officials and prison officers to be trained “in gender-sensitive

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<sup>505</sup> The Human Rights Council is an inter-governmental body made up of 47 States that seeks to promote and protect all human rights around the globe. It has the power to address thematic issues and situations deserving attention. See United Nations Human Rights Council, at [<https://www.ohchr.org/en/hrbodies/hrc/pages/home.aspx>], accessed 19 November 2019.

<sup>506</sup> Before that, in 2006 the Human Rights Council proposed a Statement that called on the Council to discuss human rights violations based on SOGI, supported by 54 States, yet the opposition of many States prevented the discussion from happening. See Diane Otto, ‘Gender and Sexual Diversity: A question of Humanity’ (2016), 17 *Melbourne Journal of International Law* 2, 477-488, at 486. In 2008, a similar Joint statement on Human Rights and SOGI was presented by the UN General Assembly and supported by 66 States, invoking expressly decriminalisation of homosexuality. See UNGA, Letter dated 18 December 2008 from the permanent Representatives of Argentina, Brazil, Croatia, France, Gabon, Japan, the Netherlands and Norway to the United Nations, addressed to the President of the General Assembly, 63rd Session, Agenda Item 64[b], U.N. Doc A/63/635 (22 Dec 2008). 57 States issued a counter-statement sustaining that the other States were trying to introduce notions without legal foundations that may legitimise “many deplorable acts including pedophilia.” See UNGA OR, 63<sup>rd</sup> session, 70<sup>th</sup> plen mtg, Agenda Item 64(b), UN Doc A/63/PV.70 (18 December 2008) 30-2 (Syria).

<sup>507</sup> Finnemore and Sikkink, n.148; M. Joel Voss, ‘Contesting Sexual Orientation and Gender Identity at the UN Human Rights Council’ (2018), 19 *Human Rights Review* 1, 1-22. Differently from other UN treaty bodies or Special Rapporteurs, the Human Rights Council seeks to produce norms with prescriptive goals, rather than merely suggesting the desirable course of action to States.

<sup>508</sup> As compared to the apolitical mandate of Independent Experts or Committees appointed on the grounds of treaty provisions.

<sup>509</sup> See Voss, n.507, at 3. Kelly Kollman & Matthew Waites, ‘The global politics of lesbian, gay, bisexual and transgender human rights: an introduction’ (2009), 15 *Contemporary Politics* 1, 1-17, at 5.

<sup>510</sup> Resolution 17/19 on Human Rights, Sexual Orientation and Gender Identity was the first specific Resolution on the issue of SOGI adopted by a UN body. In 2014, the HRC adopted a second Resolution (27/32) on Human Rights, Sexual Orientation and Gender Identity. Michael Kirby, ‘Sexuality and international law: the New Dimension’ (2014), *European Human Rights Law Review*.

approaches to addressing violations related to sexual orientation and gender identity” and “to protect the safety of LGBT detainees, holding to account State officials involved or complicit in incidents of violence.”<sup>511</sup> The Commissioner illustrated crucial steps to go beyond an approach based exclusively on legal reform rather than challenging the socio-cultural dimension of homophobia and transphobia in prison.

The appointment of the first IESOGI<sup>512</sup> has represented a step forward in the analysis of the connection between legal standards and socio-cultural assumptions on gender and sexuality in the prison context, as its mission consists not only of assessing the implementation of existing international human rights instruments with regard of ways to overcome violence and discrimination against persons on the basis of their SOGI, but also of identifying, raising awareness about, and addressing the root causes of violence and discrimination.

#### 4.5 Concluding remarks on the emergence of a UN SOGI norm

Both the YP and the proponents of the HRC Resolutions have framed SOGI in light of the principle of universality of human rights, relying on prior international law condemning violence and discrimination against LGBTI people. In the Resolutions, previous references to SOGI are used as evidence that these documents do not create any “new rights”, thus counter arguing the main criticism of States opposing the recognition of SOGI-related rights.<sup>513</sup> Therefore, the fact that Independent experts, Committees and Rapporteurs continue to cite SOGI in their reports acquires special relevance.

However, inclusivity is not easy to achieve. For instance, due to the backlash of a wide group of States, the text of Resolution 32/2 finally included a reference to the importance of respecting cultural and religious values, which have often been used in practice to discriminate and perpetuate forms of abuse against queer minorities.<sup>514</sup> This conflict makes it difficult to make an argument for elaborating the notion of universality to capture the plurality of human sexualities and identities, since the critique to universalism at the UN is often reduced to a promotion of artificially-constructed traditional values. It attests to the on-going opposition in UN political organs to consider sexuality or gender (identity) worthy of universal protection, which forces bodies such as the IESOGI to be cautious in exercising their mandate, and prevents instruments such as the YP from being applied more frequently, or interpreted in their fully subversive potential.<sup>515</sup>

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<sup>511</sup> Report of the Office of the United Nations High Commissioner for Human Rights, Discrimination and violence against individuals based on their sexual orientation and gender identity, A/HRC/19/41 (17 November 2011) and A/HRC/29/23 (4 May 2015).

<sup>512</sup> A/HRC/RES/32/2, n.460. The appointment of the IESOGI is historic, as the mandate has a legal base.

<sup>513</sup> See Voss, n.507, at 12. Annika Rudman, ‘The Value of the Persistent Objector Doctrine in International Human Rights Law’ (2019), 22 PER / PELJ, 3-5.

<sup>514</sup> A/HRC/RES/32/2, n.460, Preamble. See also McGoldrick, n.473.

<sup>515</sup> See in this sense Otto, n.506; Voss, n.507; Morgan, n.479.

#### 4.6 The SOGI norm in the context of imprisonment: promoting non-discrimination through the interpretation of the prohibition of torture or other forms of inhuman or degrading treatment

The UN's mixed record in promoting the emergence of a SOGI norm is mirrored by the approach adopted regarding imprisonment. Recommendations on sexual minorities and transgender prisoners' rights have been developed by applying an extensive interpretation of the prohibition of torture and other forms of inhuman or degrading treatment, while not much thought has been given on the impact that living in confinement has on prisoners' right to privacy and intimacy.

Reference to LGBTI (as used in the original source) prisoners are mainly limited to the work of the Committee against Torture (UNCAT),<sup>516</sup> and to the mandate of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment (SRT),<sup>517</sup> with sporadic interventions from the HRCComm.<sup>518</sup> This could be interpreted as a consequence of assimilationist advocacy, where issues affecting queer minorities that are who sufficiently "respectable" to be accepted by the heterosexual cisgender minority remain marginalised.

Nevertheless, the work of the SRT and UNCAT contributed to consolidate the connection between prisoners' – and sometimes prison staff – behaviour against sexual minorities and transgender individuals, and the protection offered by the Convention against Torture, by intersecting the prohibition of torture with the non-discrimination principle. It has represented a relatively early attempt to apply intersectionality between SOGI and the issue of serious violation of prisoners' human rights, as later recommended by the IESOGI.<sup>519</sup>

These bodies have kept using terminology referring to sexuality and gender inconsistently, revealing a tendency to rely on stable classifications. For instance, the UNCAT uses interchangeably "homosexuality," "sexual orientation,"<sup>520</sup> "LGBT" people in its Concluding Observations to States, overlooking other sexual orientations or the analysis of gender identity or expressions. Yet, in these cases the UNCAT mandate refers to single countries situations, where the Committee bases its conclusions on States and NGOs or other stakeholders' reports, so it is difficult to make generalisations.<sup>521</sup>

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<sup>516</sup> The Committee Against Torture (CAT) is the body of 10 independent experts that monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by its State parties.

<sup>517</sup> UN Commission on Human Rights, Torture and other cruel, inhuman and degrading treatment or punishment, E/CN.4/RES/1985/33 (13 March 1985).

<sup>518</sup> For instance, the HRCComm asked Colombia to provide information on the measures taken to address the problems of persons with diverse sexual orientations and gender identities in prison: see HRCComm, Colombia. Concluding Observations, CCPR/C/COL/Q/7 (17 November 2016). The HRCComm raised issues of arbitrary arrests or detention with countries criminalising same-sex sexual acts: see e.g. HRCComm, Concluding observations on the third periodic report of Kuwait, CCPR/C/KWT/Q/3 (11 August 2016); HRCComm, Liste de points établie avant la soumission du cinquième rapport périodique du Togo, CCPR/C/TGO/QPR/5 (9 December 2016); HRCComm, List of issues in relation to the second periodic report of Turkmenistan, CCPR/C/TKM/Q/2 (29 July 2016).

<sup>519</sup> UNGA, A/HRC/35/36, n.463, par. 9.

<sup>520</sup> CAT/C/CR/29/4, n.482, par. 5(a) and 6(k).

<sup>521</sup> Moekli, n.467.

A more complex narrative can be found in UNCAT General Comments:

*“The protection of certain minority or marginalized individuals or populations especially at risk of torture is a part of the obligation to prevent torture or ill Treatment. States parties must ensure that (...) their laws are in practice applied to all Persons, regardless of gender, sexual orientation, transgender identity.”*<sup>522</sup>

More recently, the SRT issued a report addressing the gender perspectives on Torture and other forms of Inhuman or Degrading Treatment or Punishment,<sup>523</sup> stating that the work of human rights bodies on torture and ill-treatment has

*“largely failed to have a gendered and intersectional lens, or to account adequately for the impact of entrenched discrimination, patriarchal, heteronormative and discriminatory power structures and socialized gender stereotypes.”*<sup>524</sup>

This statement denounces the failure of human rights institutions to tackle normative essentialism in national jurisdictions. It follows that even if States internalise human rights standards, these can hardly be applied to subvert the “structural and systemic shortcomings”<sup>525</sup> of national CJSs unless they are interpreted from a different epistemological perspective that queers the existing paradigm.

These UN reports attempts to depart from previous strategies to “mainstream” gender and sexuality<sup>526</sup> by acknowledging that also people who “do not adhere to social norms around gender and sexuality” can also be victims of these crimes.<sup>527</sup> Such opening towards more flexible classifications should be accompanied for example by a more in-depth analysis of the condition of women prisoners, and of the problems facing trans and gender non-conforming inmates.

Small steps towards a different interpretation of gender and sexuality can be observed in the mandate of the IESOGI. For instance, where its first report only refers to SOGI, more recent outlets consider also gender expression and sex characteristics. The Expert states: “everyone has some form of sexual orientation and of gender identity”, thus recognising heterosexuality and cisgenderism as orientations and identities to be addressed.<sup>528</sup>

Direct reference to the principles of humanity and diversity, and to intersectionality, are also noteworthy in order to ensure an extensive interpretation of the right to privacy and non-discrimination that conceptualise

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<sup>522</sup> CAT, General Comment No. 2 – Implementation of Article 2 by States parties, CAT/C/GC/2 (24 January 2008), par. 21.

<sup>523</sup> See UNGA, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment A/HRC/31/57 (5 January 2016).

<sup>524</sup> Ibid, par 5.

<sup>525</sup> Ibid, par. 13 and 14.

<sup>526</sup> Otto, n.104.

<sup>527</sup> A/HRC/31/57, n.523, par. 8.

<sup>528</sup> A/HRC/35/36, n.463, par. 2. As Dianne Otto points out, it is important to underline that everyone has a sexual orientation, and that heterosexuality is a sexual orientation as much as homosexuality. Moreover, these are not the only two categories defining sexuality. See Otto, n.506.

universality in terms of inclusivity.<sup>529</sup> From the start, the work of the IESOGI relied on intersectionality as a guiding principle to undertake a “multidimensional assessment of all the social factors combining to create an understanding of norms with regard to gender, sex and sexual attraction”, particularly considering that sexual orientation and gender identity must be explored in a certain context in light of notions of male/female, masculine/feminine, binary/non – binary.<sup>530</sup> On the contrary, the Independent Expert intends to conduct its activities by taking into account that “intersecting factors” can “create a continuum of violence and a dynamic of disempowerment.”<sup>531</sup> This should entail the development of an international legal discourse that considers the intersectional factors of class, race, gender and economic conditions – among others – and their impact on the treatment of LGBTQ prisoners. It represents a first necessary step to ensure the development of a more comprehensive (I would say queer) international SOGI(ESC) norm. At this stage, the work of the UN treaty and political bodies has crystallised a SOGI norm grounded on the prohibition of violence and non-discrimination in light of the UDHR, but regarding LGBTQ prisoners there is an overwhelming focus on issues of torture or other forms of inhuman and degrading treatment. For this minority’s status to become truly “mainstream,” assimilationist logics entrenched in the human rights discourse shall be queered; the current situation prevents international human rights from representing a factor of substantial change within national jurisdictions, as the data analysis will clarify.

In this regard, it does not help that the main UN Rules directly relating to prisoners’ rights do not even mention SOGI.

The ICCPR<sup>532</sup> and the Mandela Rules<sup>533</sup> support the respect of the principle of humanity and dignity during imprisonment.<sup>534</sup> The ICCPR poses reformation and rehabilitation as the main aims of imprisonment, and calls States to ensure a positive prison environment,<sup>535</sup> while the Mandela Rules call for the protection of society against crime and reduction of recidivism;<sup>536</sup> their reviewed version poses the respect of human dignity as the very first standard States must comply with.<sup>537</sup> Ultimately, both texts stipulate that prisoners should enjoy the same rights as persons outside, “subject to the restrictions that are unavoidable in a closed environment.”<sup>538</sup>

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<sup>529</sup> *Id.*, par. 3.

<sup>530</sup> UNGA, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, A/HRC/38/43 (11 May 2018), par. 22.

<sup>531</sup> *Ibid.*, par. 23.

<sup>532</sup> An international treaty ratified by almost all State parties to the UN and creating positive obligations to respect, protect and fulfil human rights recognised in the Covenant.

<sup>533</sup> UNGA, United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules or SMR), A/RES/70/175 (17 December 2015). Even if they are not legally binding, the Mandela Rules represent the most detailed legal document on prisoners’ rights within the UN system, and had acquired a relevant authoritative status. See University of Essex, Essex paper 3. *Initial guidance on the interpretation and implementation of the UN Nelson Mandela Rules*, Based on deliberations at an expert meeting organised by Penal Reform International and Essex Human Rights Centre at the University of Essex, 7-8 April 2016, at [<https://cdn.penalreform.org/wp-content/uploads/2016/10/Essex-3-paper.pdf>], accessed 9 September 2019.

<sup>534</sup> “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person” (ICCPR, n.157, Art.10).

<sup>535</sup> Moekli, n.467.

<sup>536</sup> Mandela Rules, n.533, Rule 4.

<sup>537</sup> *Ibid.*, Rule 1-5.

<sup>538</sup> HRCComm, General Comment 21, n.158, par. 3.

However, in the 2015 revision of the SMR, SOGI issues were already “mainstream”. The lack of attention to LGBTQ minorities represented a missed opportunity to deconstruct the gender binary system characterising prisons, and seriously challenge the heteronormative hierarchy informing prison life,<sup>539</sup> even if the editing of some of the Rules contributed to the adoption of a more gender-sensitive approach.<sup>540</sup> Yet, they remained gendered at their core, thus hindering the uniformity of State practice in acknowledging the SOGI norm<sup>541</sup> during imprisonment. The process of “othering” of the homosexual and transgender subject continues not only in comparison to the heterosexual male, but also to the free individual.

#### 4.7 The emergence of a SOGI norm in the Council of Europe system

The CoE has both represented a point of connection between UN standards on SOGI and imprisonment and European States, and an autonomous institutional system capable of developing its specific position on SOGI, at times taking a more progressive stance than the UN, whereas in other situations it showed a more conservative approach to balance the different position of the State parties to the ECHR in relation to gender and sexuality.

The CoE confirms the principle of universality, equality and human dignity. The Committee of Ministers further affirmed that rights shall be enjoyed by anyone without discrimination based on, among other grounds, sexual orientation and gender identity.<sup>542</sup>

The CoE non-judicial bodies, i.e. the CoM, the Parliamentary Assembly (PACE) and the Commissioner of Human Rights have addressed the situation of LGBTQ people in Europe in many instances over the years.<sup>543</sup> They have particularly focused on discriminatory practices against LGBTQ people, hate crimes and hate speech motivated by homophobia or transphobia, difficulty in accessing health care, and the legal recognition of same-sex couples.<sup>544</sup>

In recent years, they dealt with the specific problems of transgender individuals, urging State parties to introduce adequate anti-discrimination legislation and practices. They have also called for States to ensure that

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<sup>539</sup> See Giuseppe Zago, ‘Neglected minorities? An analysis of rights of prisoners of different sexual orientations and gender identities under international human rights law’, in Bee Scherer (eds.), *Queering Paradigms VII, Contested Bodies and Spaces* (Peter Lang 2019).

<sup>540</sup> Andrea Huber, ‘The relevance of the Mandela Rules in Europe’ (2016), 17 ERA Forum, 299–310. Before revisiting the SMR, the UNGA also adopted in 2010 the Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (‘the Bangkok Rules’), focusing on the specific needs of women prisoners.

<sup>541</sup> See Rudman, n.513.

<sup>542</sup> Council of Europe: Committee of Ministers, Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, 31 March 2010.

<sup>543</sup> See e.g. Council of Europe: Parliamentary Assembly (PACE), Recommendation 1474 (2000) on the situation of lesbians and gays in Council of Europe member States, 26 September 2000; PACE Resolution 1728 (2010) on discrimination on the basis of sexual orientation and gender identity, 29 April 2010. CoM, Recommendation CM/Rec(2010)5, n.542. Council of Europe: Commissioner for Human Rights, ‘Human Rights and Gender Identity’ (2009), [https://rm.coe.int/16806da753], accessed 15 May 2019.

<sup>544</sup> Ibid.



law enforcement officials are trained in acknowledging the needs of LGBTQ people, consequently fulfilling their duty to protect in line with international standards and the case law of the ECtHR.

The Commissioner, having an independent role, has played “as strong catalyst for the streamlining of LGBT(I) issues at the CoE”.<sup>545</sup>

The CoM adopted a specific recommendation on prisoners’ rights, introducing the European Prison Rules, which was reviewed in 2006. The Rules represent the most important *soft law* source regarding prisoners’ rights in Europe. The EPR serve as guidance for State parties and are often cited by the ECtHR, but unfortunately they do not explicitly consider sexual orientation and gender identity. However, the CoM has addressed the particular vulnerable situations affecting LGBT (*sic*) persons in places of detention by stressing the States’ obligation to protect them, even from actions of State officials or of other detainees.<sup>546</sup> The Committee further acknowledges that these minorities are more vulnerable to abuse, bullying, hate speech, rape and other forms of ill-treatment.

Notably, the adoption of the EPR was inspired by the enactment of the UN SMR.<sup>547</sup> However, they present specific characteristics, particularly in the definition of the scope of prison policies.

The EPR advise that ‘the regime for sentenced prisoners shall be designed to enable them to lead a responsible and crime free life’ (Rule 102.1), locating themselves halfway between the ICCPR which identifies the main aim of imprisonment as social rehabilitation and the Mandela Rules, supporting respect of prisoners’ human dignity and protection of society against crime. This is relevant, as national institutions in England and Italy have often referred to the EPR rather than the Mandela Rules to qualify the overarching aims of their prison legislation and policies.

#### 4.7.1 The role of the ECtHR in framing of the homosexual subject

The case law of the ECtHR has significantly influenced how the human rights discourse on SOGI and on prisoners’ rights is framed in England and Italy. However, the Court rarely admitted cases concerning sexual orientation and the prison system on the merits, and none regarding transgender inmates.<sup>548</sup>

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<sup>545</sup> Francesca Romana Ammaturo, ‘The Council of Europe and the creation of LGBT identities through language and discourse: a critical analysis of case law and institutional practices’ (2019), 23 *The International Journal of Human Rights* 4, 575-595, at 586. Ammaturo notices that the 2011 Report on transphobia and homophobia has adopted the linguistic choice of using homosexual, lesbian, bisexual or transgender as adjectives rather than nouns: this apparently stylistic decision actually has important philosophical repercussions in terms of de-essentialising the LGBT subject. As an adjective, sexual orientation becomes characteristics of the person instead of factors of “othering” the individual in opposition to the heterosexual person.

<sup>546</sup> CoM, Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules (EPR); CoM, CM/Rec(2010)5, n.542, memorandum, I A (4).

<sup>547</sup> See Van Zyl Smit and Snacken, n.158.

<sup>548</sup> The Court interprets the Convention by using different techniques: it can apply “the living instrument” doctrine (*Tyrer v United Kingdom* A 26 (1978): 2 EHRR 1 at par. 31), adapting the Convention provisions in light of present day conditions; or the margin of appreciation doctrine, which leaves the State’s discretionary power to regulate a certain issue

Indeed, the ECtHR competence to assess individual cases determined a development of the SOGI norm through the analysis of substantial issues. This approach consolidated a trend towards an extensive interpretation of the Convention, although the single-issue judicial analysis may have made it harder to acknowledge the full complexity of the gender and sexual diversity subject, and to extend the Convention's legal recognition and protection in order to match such complexity, instead focusing on applications concerning less controversial issues backed by stronger societal support.

Certainly, the ECtHR stated that sexuality is part of private life<sup>549</sup> and specified that “there must be ‘particularly serious reasons’ for a State to interfere with matters of sexuality.”<sup>550</sup>

With the landmark case of *Dudgeon v UK*,<sup>551</sup> the ECtHR found for the first time that criminalising same-sex sexual activity in private constitutes a violation of the Convention right to private and family life, as the applicant's homosexuality represented an essential aspect of human personality, thus his sexual behaviour shall be protected. Not only did *Dudgeon* have a profound influence on the legal recognition of homosexuality in the UK, but the case represented a point of reference for the decriminalisation of homosexuality in Eastern European, South American and Asian States.<sup>552</sup>

The cornerstone of the Court's interpretation on sexual orientation is then based on the conceptualisation of (homo)sexuality as a private activity, and of homosexuality as deeply linked with humanity.<sup>553</sup> According to Gonzales-Salzberg, the Court found the notion of identity within the definition of privacy,<sup>554</sup> while homosexuality was defined as sexual identity.<sup>555</sup> Therefore, the Court framed same-sex acts as a consequence of having a homosexual identity which deserves protection rather than being criminalised.

Johnson focuses instead on the “private” aspect of *Dudgeon*'s formulation, stating that the Court deemed homosexuality to be protected within a human rights framework under Art. 8 only in reason of its private manifestation, thus limiting the extent the right to private life can be triggered for protection. I agree with this

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according to national laws and policies, when there is no consensus among States on how a phenomenon should be disciplined. See Alastair Mowbray, ‘The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR’ (2003), 74 *British Yearbook of International Law* 1; Eyal Benvenisti, ‘The Margin of Appreciation, Subsidiarity, and Global Challenges to Democracy’ (2016), GlobalTrust Working Paper Series 05. The reliance on consensus has increased considerably through time particularly in relation to SOGI-related rights before the Court. For example, it refers to the consensus argument to not depathologise the legal recognition of gender identity. Such issues are considered controversial and the Court is not willing to pass progressive judgments that risk being ignored by a good number of Member States, particularly those that do not present a strong record in protecting LGBTQ rights, such as Russia or Turkey.

<sup>549</sup> *X and Y v Netherlands*, App. no. 8978/80 (ECtHR, 26 March 1985), par. 22: “private life is a concept which covers the physical and moral integrity of the person, including his or her sexual life.”

<sup>550</sup> *K.A. and A.D. v Belgium*, Applications nos. 42758/98; 45558/99 (ECtHR, 17 February 2005).

<sup>551</sup> *Dudgeon v United Kingdom* (1981), 4 EHRR 149, App No 7525/76 (*Dudgeon v United Kingdom*).

<sup>552</sup> See Sperti, n.121, at 19-21. The Court later reiterated his position in *Norris and Modinos*. Before *Dudgeon*, the Court rejected on admissibility grounds a number of applications where claimants argued that the so called “sodomy laws” criminalising same-sex consensual acts represented a human rights violations.

<sup>553</sup> Johnson, n.117; Wintemute, n.119, Danisi, n.115; see also Hodson, n.123.

<sup>554</sup> Gonzales Salzberg, n.117, at 62. Citing *Goodwin v UK*, the author focuses on the part of the judgment stating that “protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings” (par. 90). See *Goodwin v United Kingdom* (1996) 22 EHRR 123.

<sup>555</sup> Gonzales Salzberg, n.117, at 62.

view. Privacy played a core role in the definition of the homosexual subject as someone whose behaviour could be manifested only in closed spaces. Indeed, the recognition of the “public” homosexual was achieved only many years later by looking at other Convention provisions.<sup>556</sup>

It should not be overlooked that *Dudgeon* considered male same-sex sexuality, framing the homosexual subject in binary opposition to the heterosexual male. It is not equally clear where the Court stood in terms of female same-sex sexuality, where gendered assumptions risk intersecting with homophobic tropes.<sup>557</sup>

I would add to this reflection that the Court has been somehow forced to find alternative solutions to extending the interpretation of the non-discrimination principle as compared to UN organs, due to the residual nature of the non-discrimination provision under Art. 14 of the Convention.<sup>558</sup>

Even the recognition of same-sex relationships on the basis of the right to private and family life took place gradually, and only after a process where the Court applied the comparator doctrine until there was enough consensus among the State parties to the CoE on acknowledging some form of legal recognition for same-sex couples. Still, the Strasbourg judges were open to some form of recognition, but not same-sex marriage under Art. 12 ECHR, which remains within the margin of appreciation of the States. Overall, it is a perfect example of assimilationist practices applied to same-sex sexualities, showing legal acknowledgment to the point that it can be accepted by the heterosexual majority.

Probably, a number of cases concerning the ban of homosexual people from the military, including investigations of those suspected of homosexuality and discharged in case of identification, are the most useful to figure out how the Court’s approach to LGBTQ prisoners’ rights could be by comparison.

The characterisation of the armed forces as a total institution similar to prisons or asylums<sup>559</sup> make the cases of *Smith and Grady v the United Kingdom*<sup>560</sup> and *Lustig-Prean and Beckett v United Kingdom*<sup>561</sup> noteworthy to this study. In the UK, members of the armed forces used to be simultaneously asked to stay in the closet and to forcibly come out through various forms of inquiry. This scheme recalls the Foucauldian theory of surveillance and regulation of sexuality, which leads to a ban on “deviant” forms of sexuality while at the same

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<sup>556</sup> In particular, the Court opened up to protect Pride marches or other manifestations under Art. 11 or 3 of the Convention, and homosexual prisoners’ rights under Art. 3 and 14.

<sup>557</sup> For a deeper analysis, see Hodson, n.123, at 385–386. See also Grigolo, n.105.

<sup>558</sup> On the meaning of Art. 14, see Moekli, n.467; Oddný Mjöll Arnardóttir, ‘The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights’ (2014), 14 Human Rights Law Review, 647–670. Sperti notices that the ECtHR approach did not frame sexual orientation as an “illegitimate ground of non-discrimination,” but it could be interpreted as a reasoning to apply to all individuals rather than identifying “gays and lesbians as a discrete group.” See Sperti, n.121, at 22.

<sup>559</sup> Goffman, n.165.

<sup>560</sup> *Smith & Grady v UK* (1999), 29 EHRR 493. Hodson observes that this is the first case presented before the Court where one of the applicants identifies as lesbian and the Strasbourg judges decided in favour of the lesbian applicant. Hodson, n.123, at 387.

<sup>561</sup> *Lustig-Prean and Beckett v UK*.

time monitoring them closely. It also represented an example of toxic masculinity, where homosexual soldiers were perceived as source of (moral) corruption if not corresponding to the ideal man.

The Court found these policies in violation of Art. 8 ECHR, as there was no justification for the ban. Investigating applicants' sexuality constituted a violation of their private life due to the "detailed questions of an intimate nature about their particular sexual practices and preference,"<sup>562</sup> which were deemed unnecessary once they came out of the closet. The Court affirmed that there must be "particularly serious reasons" to interfere with a most intimate part of an individual's private life.<sup>563</sup>

According to Johnson, the Court did not consider the necessity to admit one's homosexuality a violation of privacy nor a form of degrading treatment in itself, but it found the interference to be illegitimate only when investigations were conducted after the army men came out.<sup>564</sup> On the contrary, Gonzales-Salzberg argues that the Court framed homosexuality in terms of identity: the act of confession was enough to consider the behaviour intrusive without delving into the legitimacy of the investigations proving the existence of homosexual conducts.<sup>565</sup>

These cases are relevant to homosexual prisoners, as they shed light on the limits of State interference into people's sexual orientations in a public setting. No one can be forced to admit their sexual orientation. If someone comes out, the State shall not interfere with their private life unless it is necessary and proportionate. One could argue that sex prohibition policies in prison, along with the unavailability of conjugal visitation programmes, constitute an unnecessary interference with prisoners' lives, especially when the State does not provide any detailed evidence justifying the ban, except for a general reference to security reasons.

If the Court indeed considered homosexuality as an identity, this interpretation would probably not apply in the prison context, where public authorities tend to conflate identity representation and behaviour: in spite of inmates being encouraged to come out if they want to, the State response would be to organise special protective arrangements without questioning policies sanctioning sexual behaviours. It is a challenge to these same policies and their normative foundations that could open the road to new forms of human rights recognition and protection.

In this regard, an Art. 8 defence may not be sufficient if the notion of privacy is framed in terms of free expression of sexuality in private spaces, instead of embracing an interpretation that includes homosexuality expressed both in private and in public. This notion should also acknowledge female homosexual identities, which on the contrary continue to remain largely invisible in the human rights discourse, except for cases concerning marriage and reproduction.<sup>566</sup> Paradoxically, this legal (and cultural) invisibility has guaranteed

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<sup>562</sup> *Smith & Grady v UK*, n.560, par. 91.

<sup>563</sup> *Ibid*, par. 89.

<sup>564</sup> Johnson, n.117, at 86-87.

<sup>565</sup> Gonzales-Salzberg, n.117, at 68.

<sup>566</sup> Hodson, n.123, at 392; Otto, n.479.

women prisoners more leniency in terms of entertaining same-sex relationships, although they must not be too overt, as illustrated in the data analysis.

#### 4.7.2 The case law of the European Court of Human Rights addressing sexuality during imprisonment

The limited cases examined by the Court in relation to sexual orientation during imprisonment were not based on Art. 8-related claims, which would have triggered an assessment of the difficult balance of the right to sexuality against the necessity of maintaining security and public order, but rather focused on Art. 3 and 14.

In the case of *X v Turkey*,<sup>567</sup> the judges discussed the homosexual applicant's conditions of imprisonment on the basis of Art. 3 ECHR (prohibition of torture and other forms of inhuman and degrading treatment) and Art. 14 (non-discrimination principle).<sup>568</sup>

The Court accepted the applicant's claim that Turkish prison authorities had tortured him by placing him repeatedly in an isolated cell. The applicant had been a victim of violence since he entered prison and asked to be transferred to a cell with other homosexual prisoners. On the contrary, he was placed in constant isolation, in a cell in bad material conditions without the chance to participate to any activities or have contacts with other prisoners. Isolation lasted for over eight months, causing serious psychological pain. The Court considered the duration and consequences of such treatment on the applicant, along with the domestic court's rejection of the applicant's claims and the government's refusal to adopt alternative measures to imprisonment. Ultimately, the Strasbourg judges not only found a substantial violation of Art. 3, but also acknowledged a discriminatory intent behind prison authorities' choice to place the applicant in solitary confinement based on protection justifications.

This case is noteworthy to advocate for protection of LGBTQ prisoners in national settings. Although the Court stated that a State must have "convincing and weighty reasons" to limit rights on the basis of sexual orientation,<sup>569</sup> in the context of prison it seems necessary to go beyond the private dimension of sexual

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<sup>567</sup> *X v Turkey*, n.159. As of September 2019, another case pending before the Court concerns a claim from a Romanian prisoner who complains about the refusal to allow same-sex conjugal visits in prison. In Romania prisoners enjoy conjugal visitation rights under the law. See *Duta v Romania*, IV Section, App. No. 8783/15 (ECtHR, 24 June 2019).

<sup>568</sup> For a long time, these applications were unsuccessful. As Johnson observes Art. 3 was invoked only 55 times since the instatement of the Court. Its limited application was due to the reliance on other articles of the Convention, particularly Art. 8, constructing homosexuality as part of a person's "private life." Moreover, early cases relying on Art. 3 to call for the decriminalisation of homosexuality were deemed inadmissible, thus leading applicants and their lawyers to look elsewhere in the Convention to find a legal basis for protection. Despite an increase of applications based on Art. 3 in recent years (mainly due to the rise in numbers of applications from asylum seekers who claim to flee their countries due to persecution based on sexual orientation), it seems that applicants prefer to rely on other Convention provisions as part of strategic litigation considerations to have more chances to win a case based on the previous and consolidated Court's case law. See Johnson and Falcetta, n.128, at 170-172; Johnson, n.117.

<sup>569</sup> The Court specified that discrimination on the basis of sexual orientation is generally unacceptable unless there are particularly serious reasons, meaning that States' margin of appreciation in enacting their policies is narrow. Distinctions based on sexual orientation must be necessary to realise a legitimate aim, but a distinction based solely on sexual orientation constitutes a form of discrimination. See e.g. *Lustig-Prean & Beckett v UK*, n.561; *Smith & Grady v UK*, n.560; *P.B. & J.S. v Austria*, App. no. 18984/02 (ECtHR, 22 July 2010).

orientation and acknowledge the social implications of discriminatory practices based on a person's sexual attraction.

However, in *X v Turkey* the judges seemed unwilling to accept that the systemic discrimination of the prison environment also played a role. Similarly, in *Stasi v France*,<sup>570</sup> where the applicant claimed that French authorities did not protect him from serious episodes of violence during his detention due to his sexual orientation, the Court did not engage in an assessment of the substantial effects of the law.

Mr Stasi was initially placed in a single cell after communicating to prison authorities that he had been victim of rape during his previous period of detention. At that time, he was forced to share his cell with another inmate and was beaten and harassed. Mr Stasi tried to commit suicide; after being hospitalised, he was subject to other forms of violence and harassment, and finally placed under a special regime of surveillance.<sup>571</sup>

The Court acknowledged that these abuses overpassed the threshold set by Art. 3. Yet, it did not find a violation of the Convention, as according to the Court the State had complied with its duty by adopting measures to protect the prisoner when Mr Stasi complained about the mistreatments, such as placing him in a vulnerable prisoner wing when he disclosed his sexual orientation. The fact that State legislation provided for homophobic violence to be qualified as an aggravating circumstance was also evaluated as an adequate protective measure by the Court.

This interpretation appears problematic, as the Court did not analyse the implications of the repeated episodes of violence suffered by the applicant, which evoke an environment entrenched in homophobia and systemic discrimination. The State should not only respond after violence is reported, but also create a setting that prevents it from happening in the first place.

Nevertheless, *Stasi* opened the road for an evolution of case law on Art. 3. In *Zontul v Greece*, the Court concluded that rape by means of a truncheon of a gay man by a public official while in detention amounts to torture,<sup>572</sup> and that the inadequate redress for such violation constitutes a procedural violation of Art. 3.<sup>573</sup> However, the judges did not consider the applicant's sexual orientation was relevant in connection with Art. 3.

Both *Stasi v France* and *X v Turkey* highlight the Court's approach to protection of LGBTQ prisoners' rights, consisting of assessing whether States respect their positive obligation to address sexual minorities' needs with appropriate actions.<sup>574</sup> *Stasi* may imply that passing legislation providing for the homophobic intent of crime to qualify as an aggravating circumstance is a necessary condition to comply with Art. 3.<sup>575</sup>

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<sup>570</sup> *Stasi v France*, App. No. 25001/07 (ECtHR, 20 October 2011).

<sup>571</sup> *Ibid*, par. 13-21.

<sup>572</sup> *Zontul v Greece*, App. No. 12294/07 (ECtHR, 17 January 2012), at par. 85–86.

<sup>573</sup> *Ibid*, at par. 114.

<sup>574</sup> *Danisi*, n.115, at 273.

<sup>575</sup> *Ibid*.

Johnson and Falcetta stress instead the very important precedence set by *X v Turkey*, affirming that national authorities' behaviour can amount to sexual orientation discrimination even when this discrimination is not intentional.<sup>576</sup>

Still, the Court, by stopping short of committing to a substantial analysis of the systemic inequality of the prison system in relation to non-coherent sexualities, closed its eyes to the daily suffering of LGBTQ inmates. This legal formality devoided of a queer sociological consideration permits States to introduce human rights standards without having to comply with their positive obligations, thus making even potentially inclusive laws ineffective, as the fieldwork findings will show.

The ECtHR paid more attention to the reality of sexual and gender minorities' lives in other cases related to employment discrimination in the armed forces and to hate-motivated crimes and freedom of assembly in public spaces. The Court clarified another important aspect of Art. 3 that is relevant to LGBTQ prisoners as a minority group within the penal estate:

*“treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority may, in principle, fall within the scope of Article 3.”*<sup>577</sup>

Particularly, the Strasbourg judges acknowledged that Art. 3 can be triggered in consideration of the feelings of anxiety caused by hate speech together with feelings of insecurity and fear experienced by the applicants.<sup>578</sup> In addition, authorities

*“have the duty to take all reasonable steps to unmask possible discriminatory motives”* because *“[t]reating violence and brutality with a discriminatory intent on an equal footing with cases that have no such overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights”*, and this *“may constitute unjustified treatment irreconcilable with Article 14 of the Convention”*.<sup>579</sup>

Art. 3 has been used here to protect individuals from behaviours that are against the very essence of a democratic society, and to address specific issues affecting LGBTQ people. The open-ended content of Art. 3 entails that any treatment or punishment may qualify as “inhumane” or “degrading,” thus triggering a violation of the Convention.<sup>580</sup> Such interpretation well captures also the feelings and experiences of LGBTQ prisoners.

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<sup>576</sup> Johnson and Falcetta, n.128, at 175. Significantly, the Court found that it is not necessary to qualify a certain conduct as ill-treatment to demonstrate that the victim has been treated less favourably than a person who is in a relevant similar situation, departing from a test that the Court commonly requires.

<sup>577</sup> *Identoba v Georgia*, App. No. 73235/12 (ECtHR, 12 May 2015), par. 65. See also *Smith & Grady v UK*, n.560, par. 121. In *Lustig-Prean and Beckett v. the United Kingdom* (n.561) the Court also emphasised that negative attitudes on the part of a heterosexual majority against a homosexual minority cannot amount to sufficient justification for discrimination, any more than similar negative attitudes towards those of a different sex, origin or colour.

<sup>578</sup> *Identoba v Georgia*, id. par. 70. See also *MC and AC v Romania*, App. No. 12060/12 (ECtHR, 12 April 2016), par. 117.

<sup>579</sup> *Identoba v Georgia*, n.577, par. 67.

<sup>580</sup> Johnson and Falcetta, n.128, at 168.

Human rights violations in prison could also be approached in light of Art. 8 (right to private and family life). It could be argued that prison management and staff's decisions compromise prisoners' dignity and the right to enjoy their private life in a public setting, only on the basis of their personal characteristics. However, the right to private and family life can be legitimately limited based on the retributive aim of punishment and security reasons, contrary to the prohibition of torture, which is an absolute right. Furthermore, unlike the right to private and family, the prohibition of torture and other forms of inhuman and degrading treatment is not circumscribed to specific areas of social life.<sup>581</sup>

The Court has developed the case law on sexual orientation and Art. 8 by stressing the essentially private and intimate character of sexual orientation as a manifestation of one's personality,<sup>582</sup> which excluded – at least initially – considerations of sexual orientation public manifestations.<sup>583</sup> Yet, prisoners like the participants in this study give great value to the respect of their own privacy, and that of other inmates, when discussing relationships during their conviction.

In spite of this reality, the reason behind the sporadic connections between the development of LGBTQ rights by European organs and the protection of queer prisoners, mainly based on Art. 3, may be linked with different factors, primarily the higher evidentiary threshold required to prove a violation of an absolute right. It may also depend on the fact that, differently from the UN, non-discrimination cannot become the overarching principle uniting all other rights under the ECHR umbrella. Indeed, Art. 14 is not an autonomous right, as it can only be applied in conjunction with other rights of the Convention that have been allegedly violated.<sup>584</sup>

The Court clarified that it applies to both sexual orientation and gender identity,<sup>585</sup> but it follows that the Court can analyse LGBTQ prisoners' issues in light of substantial Convention provisions, such as the prohibition of torture or the right to private and family life, rather than solely on non-discrimination.

Ultimately, I believe that this represents a crucial consequence of the way the CoE has constructed the “homosexual or transgender subject”. These have acquired a specific legal identity elaborated around the idea of “normalcy”, “respectability” and “private identity”;<sup>586</sup> the Court has particularly struggled in framing the “transgender subject”, as their very existence upsets the traditional binary legal categories the law applies to

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<sup>581</sup> Id.

<sup>582</sup> *Dudgeon v United Kingdom*, n.551, par. 52 and 60.

<sup>583</sup> See Paul Johnson, “An essentially private manifestation of human personality”: constructions of homosexuality in the European Court of Human Rights’ (2010), 10 Human Rights Law Review 1, 67-97.

<sup>584</sup> *Arnardottir*, n.558; *Danisi*, n.115, at 85. It is necessary for the Court to decide that a claim for an alleged violation of a Convention right is admissible before even considering assessment of the potential discriminatory implications of such a violation. Protocol 2 of the Convention introduces a substantial non-discrimination provision that does not require application of Art. 14 in conjunction with another right. However, very few States have ratified the Protocol so far, thus such provision can hardly be applied.

<sup>585</sup> The Court recognised that Art. 14 can be implemented also in sexual orientation-related cases in *Salgueiro da Silva Mouta v. Portugal*, App. no. 33290/96 (ECtHR, 21 March 2000), par. 28. Regarding gender identity, the Court reached a similar conclusion in *P.V. v Spain*, App. no. 35159/09 (ECtHR, 30 November 2010), par. 30. The Strasbourg judges have interpreted Art. 14 both as including personal characteristics “by which persons or groups are distinguishable from each other,” and gradually included any differences, also regarding voluntary choices (e.g. other status such as marriage). See e.g. *Kjedsen and others v Denmark*, App. no. 5095/71 et al. (ECtHR, 7 December 1976), par. 56.

<sup>586</sup> See *Ammaturo*, n.545; *Grigolo*, n.105; *Gonzales-Salzberg*, n.117; *Johnson*, n.117.



classify reality, with important implications on the way European human rights are enforced towards LGBTQ prisoners in England and Italy.

#### 4.7.3 The construction of the transgender subject in the CoE system

The ECHR presents individuals as gendered. Sex is referenced as a ground of non-discrimination, while people are categorised in light of their belonging to two oppositional sexes.<sup>587</sup> Normative binary assumptions reflect the production of legal individuals characterised by their genitalia.<sup>588</sup>

The jurisprudence of the ECtHR has not yet assessed a case concerning a transgender prisoner. However, in its recent history the Court decided a number of cases regarding the legal conditions to recognise gender identity, which constitutes an element influencing the management of transgender offenders. The Strasbourg judges have embraced a conceptualisation of gender linked with sex, therefore determined at birth. The notion of sex has been developed by the Court in opposition to the framing of the transsexual subject: in early cases, transsexuality could not exist as sex was intended in binary terms.<sup>589</sup> In so doing, the Court supported the idea that bodies through sex become human, thus making the pre-determined sex as the ontological foundation of the person.<sup>590</sup>

The Court's approach in this area affects also transgender people living in closed, sexually segregated spaces, as the more the law prescribes evidence of biological conformity of sexual characteristics with the preferred gender, the more difficult it is for transgender people who have not undertaken medical procedures to align their sex at birth with their self-identified gender.

*Goodwin v UK* represents a landmark case for transgender rights within the CoE system.<sup>591</sup> The judgment saw the Court reversing its previous approach by establishing that the right to legal gender recognition is part of the right to private life as protected by Art. 8 ECHR: their sex should be recognised on their birth certificate,

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<sup>587</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), Art. 14: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." Art. 12: "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

<sup>588</sup> Jagose, n.15; Stychin, n.61.

<sup>589</sup> Gonzales-Salzberg, n.117, at 36.

<sup>590</sup> Butler, n.334: the acceptance of biological determinism implies that sex is immutable, and the idea of plural gender identities beyond the binary male/female cannot be conceived.

<sup>591</sup> *Goodwin v United Kingdom*, n.554. Christine Goodwin is a transsexual woman who complained about the lack of legal recognition of her gender identity in her birth certificate, which caused her considerable problems, such as the impossibility of accessing the UK pension scheme at the age provided for women, as well as issues in the work environment. She also claimed that it was impossible for her to exercise the right to marry a man, since she was legally considered a male, constituted a violation of her right to marry under art. 12 ECHR. See *Goodwin v United Kingdom*, par. 13-19; 97-103. It should be noted that also the similar case *I v United Kingdom* broke grounds, but for the sake of our discussion I will focus only on *Goodwin*. See *I v United Kingdom*, App. no. 25680/94 (ECtHR, 11 July 2002).

and for the purpose of pension, marriage and retirement.<sup>592</sup> Yet, although the Court found that States parties shall provide some kind of legal gender recognition, the “appropriate means” to do so fall within the margin of appreciation of national States.<sup>593</sup>

The judgment is particularly important as the Court acknowledged that “protection is given to the personal sphere of each individual, including their right to establish details of their identity as human beings.”<sup>594</sup> In subsequent cases, the Court built upon Art. 8 to reiterate that the freedom to define one’s gender identity is a fundamental act of self-determination.<sup>595</sup> The relevance of the *Goodwin* case for transgender prisoners is confirmed by the UK Prison and Probation Service explicitly referring to the judgment in its instruction on the care and management of transgender offenders.<sup>596</sup>

Nevertheless, according to the Court the right to legal gender recognition can legitimately remain conditional on psycho-medical evaluations: the acknowledgment of Ms Goodwin’s legal status could be achieved only because the applicant was a post-operative transsexual woman. Therefore, surgery, hormone therapy and other forms of bodily modifications were unavoidable in order to be recognised as “legally human”. These interventions would usually include sterilisation.<sup>597</sup> Theilen and Sharpe among others observe that the Court’s approach remained preoccupied with aligning someone’s identity with the corresponding anatomy, in spite of the (partial) abandonment of the essentialist conceptualisation of sex.<sup>598</sup>

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<sup>592</sup> In *Goodwin*, the Strasbourg judges overturned their previous jurisprudence on trans people’s right to amend their legal gender. Initially, the Court established that States were not obliged to fully recognise the gender transition of transsexual people. *Rees v United Kingdom* (1986), Series A no 106; *Cossey v United Kingdom* (1990) Series A no 184; *Sheffield and Horsham v United Kingdom*, Applications Nos. 22985/93 and 23390/94 (ECtHR, 30 July 1998). See also Hon. Reed, n.135, at 90. Gonzales-Salzberg, n.117; Frédéric Edel, *Case law of the European Court of Human Rights relating to discrimination on grounds of sexual orientation or gender identity* (Council of Europe 2015), at 101-102. In these cases, the applicants underwent gender reaffirming surgery and got their names changed and their new sex was recognised in their passports, but they could not obtain an amendment of their birth certificate. In *Sheffield and Horsham*, the applicants, who also completed a gender reaffirming surgery procedure to become women, were still considered legally men in many aspects of their life, such as for pension purposes. According to the Court in these judgments, there was limited consensus among the State parties to the CoE concerning the issue of legal gender recognition, therefore national jurisdictions had a wide margin of appreciation to establish the extent of such legal acknowledgement. See *Rees v UK*, par. 47. In these decisions, the Strasbourg judges did not offer a definition of gender, but they relied on the biological categorisation of sex at birth, thus supporting the framing of identities in essentialist terms. See Alex Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (Cavendish 2002).

<sup>593</sup> *Goodwin v UK*, n.554, par. 93.

<sup>594</sup> *Ibid*, par. 90.

<sup>595</sup> *S.V. v Italy*, App. No. 55216/08 (ECtHR, 11 October 2018), par. 54 – 55. *A.P., Garçon and Nicot v. France* application nos. 79885/12, 52471/13 and 52596/13 (ECtHR, 6 April 2017), par. 93; *Y.Y. v Turkey*, App. no. 14793/08 (ECtHR 10 March 2015), par. 66. See Cannoot, n.125.

<sup>596</sup> HM Prison and Probation Service, PSI 17/2016, The Care and Management of Transgender Offenders, 9 November 2016.

<sup>597</sup> See Jens Theilen, ‘Beyond the Gender Binary: Rethinking the Right to Legal Gender Recognition’ (2018), *European Human Rights Law Review* 249, at 2; Cannoot, n.125, at 18-19. Biological sex continued remaining a core element in defining someone’s identity, even if other medical factors beyond the biological characteristics of the acquired sex were considered more significant in the eye of the law, such as surgical treatment: “[A] test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual. There are other important factors – the acceptance of the condition of gender identity disorder by the medical professions and health authorities within Contracting States, the provision of treatment including surgery to assimilate the individual as closely as possible to the gender in which they perceive that they properly belong and the assumption by the transsexual of the social role of the assigned gender” (*Goodwin v UK*, n.554, par. 80).

<sup>598</sup> Theilen (2018), Sharpe, n.592.

This interpretation of the right to private life and personal autonomy embraces the pathologisation of transgender persons, who has continued informing the Strasbourg judges' case law on trans rights. Progress has been made in stating that compulsory sterilisation is not a necessary requirement to obtain legal gender recognition as a similar provision would violate the person's bodily integrity.<sup>599</sup> More so, in *A.P., Garçon and Nicot v France*, the ECtHR stated that the French legislation requirement that the applicant should present evidence of a "syndrome of transsexuality" and of the "irreversibility of transformation of the bodily appearance into the opposite sex" is in breach of the Convention in the part that imposes this requirement as a pre-condition to access surgery, as it disproportionately interferes with the applicant's private life.<sup>600</sup>

It means that genital surgery – as a practice that is a sterilising procedure – cannot be a requirement for legal gender recognition anymore. According to Gonzales-Salzberg, this signs the moment where the ECtHR abandoned the naturalisation of gender.<sup>601</sup> Nevertheless, the Court did not depart from previous jurisprudence concerning the requirement of providing proof of psychological and medical nature, thus supporting a general pathologisation of transgender identities.<sup>602</sup> Although the Court mentioned the principle of self-determination since *Goodwin*, this remains entrenched in medical considerations.<sup>603</sup>

Other CoE bodies, such as the CoM or the PACE, have issued more forward-looking recommendations on the issue of gender identity which acknowledge its social dimension beyond anatomical characteristics, and call for recognition of self-determination in affirming the person's preferred gender.<sup>604</sup>

Still, the Court remains far more effective than other CoE political bodies in influencing States parties' policies,<sup>605</sup> while the judges seem to refer only to those recommendations that do not depart from the medical normative paradigm defining gender identity.<sup>606</sup>

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<sup>599</sup> *Y.Y. v Turkey*.

<sup>600</sup> *A.P., Garçon and Nicot v France*, n.595, par. 83, 116, 123. Cannoot, n.125, at 21.

<sup>601</sup> Gonzales-Salzberg, n.117, at 55.

<sup>602</sup> Theilen (2018), Cannoot, n.125; *A.P., Garçon and Nicot v France*, n.595.

<sup>603</sup> When supporting a more progressive interpretation of gender identity beyond medicalised characterisations, the Court tends to refer to important international trends within the context of transgender rights, as it did – for example – in the *Y.Y. v Turkey* decision. These openings are however limited in scope if balanced and do not recognise the principle of self-determination.

<sup>604</sup> The Parliamentary Assembly of the Council of Europe called for State parties to "develop quick, transparent and accessible procedures, based on self-determination, for changing the name and registered sex of transgender people on birth certificates, identity cards, passports, educational certificates and other similar documents; make these procedures available for all people who seek to use them, irrespective of age, medical status, financial situation or police record." See Council of Europe: Parliamentary Assembly Resolution 2048 on discrimination against Transgender People in Europe, 22 April 2015, para. 6.2.1.

<sup>605</sup> On the impact of the Court's judgments on issues regarding LGBT rights, see e.g. Laurence R Helfer and Erik Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe' (2014), 68 *International Organization* 1, 77-110.

<sup>606</sup> For instance, in *Y.Y. v Turkey* the ECtHR clarified that sterilisation as a necessary condition to admit a transgender patient to surgery violated the applicant's right to private life, yet the judges did not explicitly state that infertility should not be contemplated by States as a requisite for gender recognition, which consequently remains on the table. *Y.Y. v Turkey*, par. 116.

When the Court cites the consensus doctrine to justify its judicial stance, it supports a societal view of gender identity characterised in essentialist terms, with implicit homophobic traits.<sup>607</sup> It focuses on a narrow representation of society while overlooking more progressive international trends, including new legislation adopted or discussed in some member States

In conclusion, the Court developed its jurisprudence by including transgender individuals who refused genital surgery among those who qualify as legal subjects. However, the continual overreliance on medicalisation of gender identities leave non-binary or gender non-conforming people, as well as transgender people who are required to be diagnosed with a mental health disorder, in a grey area. In the prison context, two cases that expressly addressed for the first time the situation of transgender people inside prisons and could have potentially inverted this trend were not adjudicated in the merits: *Bogdanova v Russia*<sup>608</sup> and *G.G. v Turkey*.<sup>609</sup>

*Bogdanova* would have helped to clarify whether the State's incapability to guarantee trans prisoners access to hormone cure treatment, psychological assistance, and more generally to health care, constitutes a human rights violation.<sup>610</sup> The case would have also contributed to expose the risks suffered by trans inmates in terms of sexual violence, rape and abuse, and the consequences of isolation practices that can even result in a solitary confinement regime.<sup>611</sup>

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<sup>607</sup> See Sharpe, n.592.

<sup>608</sup> *Bogdanova v Russia*, App. no. 63378/13, communicated on 19 February 2015, Communication together with *Nikulin v Russia*, no. 30125/06 and 20 other applications. In *Bogdanova v Russia*, the applicant was a detained transsexual woman who, prior to her imprisonment, had undergone male-to-female gender reassignment surgery. Initially detained in a temporary detention facility, she was later transferred to a correctional colony after her conviction sentence became final. She was then transferred a second time to a tuberculosis hospital. *Bogdanova* affirms that prison authorities did not guarantee the continuation of her hormone therapy after imprisonment, despite her numerous complaints due to the essentiality of continuing the hormone treatment in light of her previous GRS. Once the applicant was finally prescribed a hormone replacement therapy, she was informed that she would have had to pay herself, which made the access to healthcare impossible for her, since she did not have enough economic resources to buy the treatment. Moreover, *Bogdanova* also denounced a violation of her right to privacy, as prison authorities would have allegedly disclosed her GRS, thus making her vulnerable to abuse from the rest of the prison population. Therefore, the applicant claims a violation of Art. 3 of the Convention for lack of adequate medical treatment, and of Art. 8 after the authorities made sensitive information public. *Bogdanova* was struck out of the list because the applicant did not continue with submission of observations to the case.

<sup>609</sup> *G.G. v Turkey*, App. No. 10684/13, communicated on 24 November 2012. *G.G.* was found inadmissible due to non-exhaustion of domestic remedies.

<sup>610</sup> ILGA Europe, Transgender Europe and other NGOs advocating LGBT rights participate in the proceeding with written comments as a third party intervener. They highlight that interrupting hormone treatment may have serious consequences, both physical (e.g. joint and muscle aches, tiredness and irritability, and increased sweating and flushes) and psychological to the point of increasing the risk of suicide for transgender prisoners. See *G.G. v Turkey (Application No. 10684/13)*, *Written Comments submitted jointly by Transgender Europe (TGEU), Coming Out, The European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA - Europe), The European Professional Association for Transgender Health (EPATH)*, 10 June 2015, at [[https://www.ilga-europe.org/sites/default/files/Attachments/bogdanova\\_v\\_russia\\_third\\_party\\_intervention\\_by\\_tgeu\\_coming\\_out\\_epath\\_ilga-europe\\_10\\_6\\_2015.pdf](https://www.ilga-europe.org/sites/default/files/Attachments/bogdanova_v_russia_third_party_intervention_by_tgeu_coming_out_epath_ilga-europe_10_6_2015.pdf)], accessed 31 January 2020.

<sup>611</sup> See Written Comments, id., par. 23-24.

Similarly, *G.G. v Turkey* denounced the Turkish authorities' refusal to cover the costs of gender reassignment treatment, even if it was considered "imperative and urgent" by courts and doctors.<sup>612</sup> The application would have also tackled location policies on birth sex instead of gender identity.<sup>613</sup>

Ultimately, the Court's approach on gender identity, more prone to consider the legal recognition of gender in medical terms, risks offering limited support to the instances of transgender prisoners, let alone of all other non-binary people who remain almost completely invisible in the CJS.

On the contrary, the CoM, PACE and the Commissioner for Human Rights – although less impactful – have supported legal gender recognition based on self-determination. The latter concluded that pathologisation of trans identities "may become an obstacle to the full enjoyment of human rights by transgender people especially when it is applied in a way to restrict the legal capacity."<sup>614</sup> The PACE qualified all medical requirements for legal gender recognition as violations of fundamental rights – especially of the right to private life under Art. 8 ECHR – and called Member States to introduce legislation regulating legal gender recognition on the sole basis of self-determination.<sup>615</sup> At this moment, England and Italy have failed to internalise this recommendation into their State practice.

#### 4.8 Concluding remarks

The international homosexual and transgender subject has been framed by UN and the CoE institutions mainly on the basis of the principle of privacy and non-discrimination, and at a later stage by elaborating new forms of protection on the basis of the prohibition of torture and other forms of inhuman and degrading treatment.

Regarding LGBTQ prisoners, a few main considerations should be taken into account when the next chapters will analyse how these principles have been internalised in the English and Italian prison system. First, the international homosexual and transgender subjects are mostly established on the basis of heteronormative and gendered paradigms. They are tendentially "drawn from" the heterosexual male prototype. Secondly, a reliance on the right to privacy – interpreted as the freedom to express one's identity in closed spaces – makes it difficult to elaborate forms of recognition and protection in the public arena. Finally, the transgender individual lacks the more extensive protection offered to the "assimilated" gay male individual. Gender identity is defined by

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<sup>612</sup> See Council of Europe: Parliamentary Assembly Report Doc. 13742, Discrimination against transgender people in Europe, 30 September 2013, par. 55.

<sup>613</sup> See *G.G. v. Turkey Written Comments submitted jointly by TGEU, ILGA - Europe, Kaos GL, Counseling Center T-Der*, par. 23-27. As underlined by a group of NGOs which participate to the proceedings as third party interveners, the situation of transgender prisoners – but also of other inmates belonging to a sexual minority – is concerning, considering that there are no legal provisions addressing the special needs of LGBTQ inmates, and that there is no official data on the number of LGBTQ prisoners hosted in Turkish prisons, also due to the fact that sexual orientation is a criterion to classify prisoners, but this implies that individuals must disclose it to the staff; moreover, the criterion regarding prisoners who have a different sexual orientation is interpreted and conflated to include also gender identity.

<sup>614</sup> Council of Europe Commissioner for Human Rights, 'Human Rights and Gender Identity', n.543, at 3.

<sup>615</sup> PACE Resolution 2048, n. 604; Council of Europe: Parliamentary Assembly Resolution 2191 (2017), Promoting the human rights of and eliminating discrimination against intersex people, 12 October 2017.

heavily relying on medicalisation, in spite of important openings from institutions like the PACE. Some minority groups tend to be conflated within the LGBT(I) acronym; women, particularly lesbian, are invisible in the prison context unless for questions of reproduction and parenthood.

The exercise of assimilationist discourses entails that international standards on prison only partially benefit from the developments that have occurred in the area of SOGI. The Mandela Rules and the EPR never explicitly mention these characteristics. Issues affecting LGBTQ prisoners are addressed in broad terms, relying on general calls for stopping homophobic and transphobic violence, while a thorough analysis of deprivation of sexuality and lack of effective recognition of gender identity is lacking.

The ECtHR could provide more substantial change. The Court's approach to Art. 3 has shifted greatly from *Stasi v France* to *X v Turkey*. Whereas in *Stasi* the Court was seemingly satisfied that formal legislation is in place to tackle hate-related crimes and prison authorities take protective measures after prisoners' complaints, in later cases it called for a more proactive and pre-emptive approach to protect sexual orientation in public spaces. However, in *X v Turkey* the applicant's treatment was considerably harsher as compared to the rest of the prison population. Therefore, it remains to be seen whether in future cases more similar to *Stasi*, the Court would start evaluating the systemic shortcomings of the carceral state regarding queer minorities.

Ultimately, I would hesitate to say that a SOGI norm has emerged in the area of imprisonment. The analysis of English and Italian legal frameworks together with the data collected during my fieldwork will show that the lack of a truly pluralistic SOGI norm that is queerly inclusive of all expressions of gender identities and sexualities allows national public authorities to maintain unequal policies in spite of the formal adherence to internalised human rights rules. These refer to the overarching commitment to reformation and social rehabilitation (ICCPR), protection of society against crime (Mandela Rules) or prisoners' enablement to conduct a responsible life (EPR); however, such aims need to be questioned through a queer lens to effectively achieve their goals, in order to reconsider the continually reiterated assumptions on the (gendered and normalised) subject that States intend to reintroduce to society.

## Chapter 5

# Constitutional principles on prison law and the process of internalisation of human rights in England and Italy

Both UN and European standards play a significant role in shaping prison policies in England, and Italy. This chapter analyses the legal framework regulating prisons within both jurisdictions and scrutinises legal provisions that have an impact on LGBTQ prisoners' lives. A focus on how international and European human rights are internalised within national policies is necessary to test the effects of their enforcement within the carceral complex.

### 5.1 The aims of imprisonment and the legal framework regulating prison life in England and Wales

In the UK, the contemporary underlying objectives of prison policies are not fully discernible and oscillate between the willingness to punish citizens who are guilty of committing certain types of crimes as a form of retribution; the guarantee of order and security via risk management policies; and prisoners' rehabilitation.

In a common law system, the judiciary should play a significant role in defining the aims of imprisonment. However, the relationship between prison and law has developed in a peculiar way as compared to other legal areas: judges started deciding on legal claims from prisoners only in the 1970s, and they have tended to intervene on issues of jurisdiction and procedure, rather than engaging with questions of control and management of prisoners, and ultimately, of human rights guarantees. In this sense, the ECtHR has proved to be more protective towards prisoners' human rights than English courts.<sup>616</sup> Even if the *Leech* judgment established that governors exercising disciplinary power were subject to judicial review,<sup>617</sup> they still maintained wide discretion in taking decisions.

The aims of imprisonment are not clearly defined in a legislative source, either. The lack of an explicit statutory mandate leads to conflict between different aims which tend to serve the accomplishment of divergent outcomes.<sup>618</sup>

Prison Rule 3 identifies the scope of imprisonment in encouraging and assisting prisoners to lead a good and

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<sup>616</sup> Stephen Livingstone, Tim Owen QC, Alison McDonald, *Prison Law* (3<sup>rd</sup> edition, Oxford University Press 2003).

<sup>617</sup> *Leech v Deputy Governor, Parkhurst Prison* [1988] AC 533.

<sup>618</sup> Liora Lazarus, *Contrasting Prisoners' Rights – A Comparative Examination of England and Germany* (Oxford Monographs on Criminal Law and Justice – Oxford University Press 2004); Lazarus, n.164; Genders and Player, n.164. As observed in Chapter 4, international rules on prison do not clarify this ambiguity, as the Mandela Rules, the ICCPR and the EPR stress different scopes in support of imprisonment as a form of punishment.

useful life.<sup>619</sup> Yet, other statements concerning the principles, or the purpose, or the tasks underpinning the prison system can be found in many other documents which in practice are equally as binding as the Prison Rules.<sup>620</sup> For instance, the HM Inspectorate of Prisons issued the document *Expectations concerning the criteria for assessing the condition and treatment of men in prisons*, which relied on the promotion of prison conditions that reflect at least minimum international human rights standards, including – among others – the principle of proportionality and non-discrimination in convicting offenders; contextually, prison conditions shall be evaluated on the basis of performance tests that consider managerial values, such as leadership capabilities and their influence on prisoners’ outcomes.<sup>621</sup>

In recent years, the UK government and Parliament have discussed at length the necessity of reforming the prison system. A Prison and Courts Bill was proposed by the Government and discussed in the House of Commons in 2016, but it fell with the dissolution of Parliament in May 2017.<sup>622</sup> According to the White Paper illustrating the scope and objectives of the reform, the Bill intended to re-structure the organisation of prison institutions, particularly clarifying the role of the Secretary of State, and should have focused on strengthening safety and security inside prisons after many documented episodes of violence occurred in the preceding years.

More specifically, the White Paper stressed that the legal framework would have been re-structured by including the aims of imprisonment in a statutory instrument, highlighting that everybody working in the prison system’s aim is to “protect the public and reform offenders”.<sup>623</sup> It thus appears that the proposed reform would have primarily favoured society protection, and rehabilitation in relation to this aim. Even the White Paper attempted to balance the necessity of a clear statutory mandate against accountability and management of prison actors, but it was not always successful in elaborating on the former. Notably, there was no explicit mention of human rights in the document.<sup>624</sup>

As observed by Genders and Player, there is a renewed focus in the English debate around prisons and rehabilitation. Nevertheless, the notion of rehabilitation which the State seeks to deliver is less concerned with social welfare and more connected with a “New Penology” that relies on risk management to contain offenders’ potential danger to society rather than taking care of prisoners’ health and well-being (also in light of post-

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<sup>619</sup> Prison Rules 1999, Rule 3.

<sup>620</sup> See Lazarus, n.164, at 739.

<sup>621</sup> HM Inspectorate of Prisons, *Expectations – Criteria for assessing the treatment of and conditions for men in Prisons*, Version 5, 2017, at [https://www.justiceinspectorates.gov.uk/hmiprisoners/wp-content/uploads/sites/4/2018/02/Expectations-for-publication-FINAL.pdf], accessed 1 September 2019.

<sup>622</sup> See Ministry of Justice, *Prison Safety and Reform. Policy Paper*, 3 November 2016. See also the UK Government website, at [https://www.gov.uk/government/news/prisons-and-courts-bill-what-it-means-for-you]

<sup>623</sup> Prison Safety and Reform, *ibid*, at 13.

<sup>624</sup> The Bill would have amended S. 1 of the Prison Act 1952 with the following provision:

*In giving effect to sentences or orders of imprisonment or detention imposed by courts, prisons must aim to—*

*(a) protect the public,*  
*(b) reform and rehabilitate offenders,*  
*(c) prepare prisoners for life outside prison, and*  
*(d) maintain an environment that is safe and secure.*



release perspectives).<sup>625</sup> This has obvious consequences for the way human rights principles are acknowledged and integrated in individual policies.

The prevalence of management-led programmes probably depends on the fact that domestic legislation has had a relatively minor impact in defining the way prisoners are treated in places of detention.<sup>626</sup> Courts, on the other hand, have been historically at the centre of this normative dilemma, assessing in their case law – although reluctantly – whether prison should serve rehabilitation, retribution or public order.<sup>627</sup>

Before further analysing this point, it is convenient to give a brief overview of the English prison legal framework, focusing on how the aims of imprisonment are presented.

The Prison Act 1952 is the only statutory source regulating prisons. It outlines the legal responsibility to manage the prison system, and provides the Secretary of State with maximum discretion and management (superintendence) powers over the prison system.<sup>628</sup> The Act established the Chief Inspector of Prisons and a Board of Visitors for each prison (now known as Independent Monitoring Boards).<sup>629</sup> Although statutory in nature, the Prison Act gives ample powers to the Secretary of State, but does not create any clear statutory rights for prisoners.<sup>630</sup>

The substantial rules governing prison life are included in the Prison Rules 1999 and in the Prison Service Instructions and Orders (PSIs and PSOs).

The Rules made explicit the rule-making power of the Secretary of State, who can enact prescriptions to regulate and manage prisons, as well as to classify and dictate the treatment, employment, discipline and control of inmates.<sup>631</sup> The Rules shall be created by statutory instrument, and qualify as delegated legislation.<sup>632</sup> After their entry into force, they incorporated the amendments subsequent to the enforcement of the Human Rights Act, and stipulated general norms, specific rights, prohibitions and obligations, rules on discipline, prison staff duties and obligations, and visitation programmes.<sup>633</sup> After the *Hague* judgment, judicial

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<sup>625</sup> Genders and Player, n.164. Other experts have explored the consequences of a management-driven approach to imprisonment: see e.g. Bennett, n.176.

<sup>626</sup> Genders and Player, *ibid*, at 442-443.

<sup>627</sup> Lazarus, n.164, at 738.

<sup>628</sup> Prison Act 1952. Livingstone and others, n.616; Margaret Obi, *Prison Law – A Practical Guide* (The Law Society Publishing 2008).

<sup>629</sup> Prison Act 1952, Ss. 5A and 6-9. The Chief Inspector is a monitoring body referring to the Ministry of Justice, which overviews prison conditions and also issues an annual report to Parliament. The IMB has power to visit prison and monitor prison daily life and ensure that appropriate standards are respected, but the Board does not have any statutory power, or competence to change policy or overturn staff decisions. The IMB has replaced the Boards of Visitors with the enactment of s. 26 of the Offender Management Act 2007.

<sup>630</sup> Livingstone and others, n.616, at 6.

<sup>631</sup> Prison Rules 1999, S. 47(1).

<sup>632</sup> Livingstone and others, n.616, at 15.

<sup>633</sup> Professor Zellick has divided Prison Rules into five groups: “rules of general policies objectives”; “rules of discretionary nature”, leaving various important decisions to the discretion of prison authorities; “rules of general protection”, focusing on health and welfare standards; “rules on institutional structure and administrative functions”, detailing provisions aimed at providing benefits for prisoners and at the same time regulating prison institutions’ duties in order to facilitate prisoners’ life and respect their rights; and finally “rules of specific individual protection.” See Livingstone and others, n.616, at 17-19.

supervision powers have been extended to include administrative and operational matters within prison, thus making a new form of remedy available to prisoners.<sup>634</sup>

It is however in the PSOs and PSIs that the majority of specific guidance and directions informing prison life can be found. Since 2009, all new instructions have been issued as either PSIs, Probation Instruction or NOMS (now HMPPS) Agency Instructions.<sup>635</sup> The instructions are regularly updated and have been modified through time in order to ensure clarity in the definition of levels of autonomy, responsibility and accountability related to all main prison stakeholders.<sup>636</sup> PSIs and PSOs are meant to be short-term documents, but are extremely relevant for inmates. For instance, the way prison authorities intend to manage transgender prisoners is entirely regulated by PSIs.<sup>637</sup> Still, these documents do not have any legal status and have no legislative authority.<sup>638</sup> Consequently, the administrative guidelines cannot provide for limitations of prisoners' rights that do not have foundations within the Prison Act, the Prison Rules or the Human Rights Act (HRA).<sup>639</sup>

#### 5.1.1 Prisoners' rights after Leech (No. 2); the adoption of the Human Rights Act and the Equality Act 2010

The somehow scattered definition of the aims of imprisonment in the English system is due to the lack of a centralised constitutional system where fundamental principles can be found in one core document, and to the great reliance on administrative instructions to regulate prison life. Although the UK does not have a codified written constitution, constitutional principles are obviously at the core of its legal framework, yet they are spread across customary law, legislation and case law.<sup>640</sup>

This system makes it difficult to identify and accomplish the aims of imprisonment. On one side, English courts have been required to define the scope of imprisonment and balance overarching principles against prison management considerations; yet, after the adoption of the HRA public authorities are also explicitly asked to comply with human rights standards, whereas institutional practices have to balance a number of requirements in opposition to each other, such as justice and humanity, security and safety.<sup>641</sup>

These phenomena influence the process of identification of prisoners' legal status at different levels, either legal or administrative.

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<sup>634</sup> *R. v Deputy Governor of Parkhurst Prison ex p. Hague, Weldon v Home Office* [1992] 1 AC 58.

<sup>635</sup> Stephen Livingstone and others, *Prison Law* (5<sup>th</sup> edition, Oxford University Press 2015).

<sup>636</sup> The necessity of introducing clear purpose in these administrative instruments has been stressed in particular in the Woolf Report: Woolf H, Sir, *Access to justice: final report to the Lord Chancellor on the civil justice system in England and Wales* (London HMSO 1996) (Woolf report).

<sup>637</sup> See e.g. PSI 17/2016, n.596.

<sup>638</sup> Livingstone and others, n.616, at 24. Obi, n.628; Simon Creighton and Vicky King, *Prisoners and the Law* (2<sup>nd</sup> edition, Butterworths London, Dublin and Edinburgh 2000).

<sup>639</sup> See *Raymond v Honey* [1983] 1 AC 1.

<sup>640</sup> Anastasia Karamalidou, *Embedding Human Rights in Prison. English and Dutch Perspectives* (Palgrave MacMillan 2017), at 30.

<sup>641</sup> Genders and Player, n.164, at 437-438; Murphy and Whitty, n.176.

According to Lazarus, when considering the prisoner's legal status, one should separate the deprivation of personal liberty and human rights derived from a judicial sentence (the content of punishment) and the limitation to prisoners' "residual" liberty descending from the application of administrative policies.<sup>642</sup> In other words, deprivation of liberty should not represent an absolute loss of liberty, as prisoners continue to enjoy fundamental human rights.<sup>643</sup> Prison policies can introduce limitations, but they shall be evaluated at another level of analysis.<sup>644</sup> Adopting a human rights-based approach in assessing risk management policies is crucial in a prison legal framework that elevates administrative practices as standard-generators, as human rights can contribute to manifesting major organisational risks, even in legal or reputational terms. Going beyond the oppositional notion of risk management versus rights, instead embracing a view that rights can be entrenched in risk management policies, produced beneficial results in reducing organisational tensions.<sup>645</sup>

The assessment of the legitimacy of administrative limitations in light of human rights entails the evaluation of the legality and proportionality of any adopted measures, for instance by applying the ECtHR interpretation of the ECHR. The proportionality test acquires significance if it is made explicit whether it is applied to balance a general human rights principle against the broad aim of maintaining security inside prison and protect the public, or if it assesses the proportionality of the specific administrative measure hindering prisoners' residual liberty. In the latter, the analysis is conducted in relation to the individual prisoner's condition as affected by a determinate policy, and the evaluation ends up being more attuned to prisoners' needs rather than discussing abstract principles without considering the context of the analysis.<sup>646</sup>

For the examination of different levels characterising prisoners' legal status to be comprehensive, the principles informing the legislation on prison, and the ones qualifying administrative policies, shall be clearly laid out and anchored to human rights.

Before the entry into force of the HRA, the House of Lords decided in *Leech (No 2)* – and later confirmed in *R (Daly) v Home Secretary*<sup>647</sup> – that prisoners' fundamental rights should be subject to minimum interference by prison administration, unless the Parliament decides otherwise, and in doing so, the latter shall respect the principle of proportionality.<sup>648</sup> *Daly* clarified that PSOs curtailing prisoners' rights do not deprive inmates of all the rights citizens enjoy, since some human rights continue being guaranteed, at times in more limited form. To withdraw certain rights from prisoners, an act of Parliament is necessary.<sup>649</sup> However, a system where

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<sup>642</sup> Lazarus, n.164, at 742.

<sup>643</sup> As reiterated by international human rights law: van Kempen, n.156; Van Zyl Smit and Snacken, n.158.

<sup>644</sup> The European Court of Human Rights clarified this point in *Golder v UK* [1975] 1 EHRR 524.

<sup>645</sup> Noel Whitty, 'Human rights as risk: UK prisons and the management of risk and rights' (2011), 13 *Punishment and Society* 2, 123-148.

<sup>646</sup> Lazarus, n.164, at 743; Genders and Player, n.164.

<sup>647</sup> *R (Daly) v. Home Secretary* [2001] 2 AC 532.

<sup>648</sup> *R v. Home Secretary, ex p. Leech (No.2)* [1994] QB 198. Before this judgment, *Raymond v Honey* (n.639) paved the road towards a more explicit recognition of prisoners' rights by stating that inmates maintain all civil rights that are not expressly removed by Parliament – or are lost by implication after imprisonment.

<sup>649</sup> *R (Daly) v Home Secretary*, n.647.

fundamental principles guiding prison policies are not integrated in a statutory instrument led to courts not following the *Leech* test consistently in cases where security reasons were considered more pressing.<sup>650</sup>

Over the years, official reports have urged the Parliament to modify prison rules to align with clear human rights grounds.

The Woolf report<sup>651</sup> concluded that safe and secure detention shall be humane, fair and just. It stressed the importance of considering prisoners as agents who can – and should – make their own choices and act responsibly. To promote prisoners' responsibility, a contract should be concluded between the prison management and the Secretary of State with this goal in mind.<sup>652</sup> The report focused on the organisation of prisons, and included a human rights dimension. For instance, the report introduced the idea of an independent adjudicator for prisoners' complaints, which determined the creation of the office of the Prisons Ombudsman in 1994.<sup>653</sup>

Another noteworthy document for prison reform, the Corston Report, focused specifically on living conditions in women's prisons.<sup>654</sup> The report called for the introduction of a holistic approach to the management of women's penal estates, centred on their occupants and guided by strategic proportionate measures.<sup>655</sup> Particularly, the report stipulated that problems faced by women in prison are qualitatively different than men's, and that their multiple complexity should be appreciated.

Although they present a mix of managerial and rights-based language in various degrees, and not all the changes they promoted have been fully received or rapidly implemented, these reports have helped pinpoint major issues affecting the English prison system, such as the absence of a Bill of Rights or the judges' caution in taking decisions that they perceived as more political or administrative than judicial.

Therefore, the introduction of the HRA had the potential to represent a fundamental moment to recalibrate the tension between different aims of imprisonment and their implications for the legal status of prisoners.

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<sup>650</sup> Lazarus, n.618.

<sup>651</sup> The Woolf report, drafted by Lord Woolf, probably remains the most significant inquiry on prison conditions in the UK. It was commissioned by the Home Secretary upon parliamentary pressure after the riots that took place at HMP Strangeways and in other penal estates in 1990. See Elaine Player and Michael Jenkins, *Prisons After Woolf – Reform through riot*, Elaine Player and Michael Jenkins eds. (Routledge 2001).

<sup>652</sup> Woolf report, n.636, par. 14.14; 12.120-12.122.

<sup>653</sup> See Prisons and Probation Ombudsman (PPO), at [<https://www.ppo.gov.uk/>], accessed 15 December 2019. Simon Creighton and Hamish Arnott, *Prisoners Law and Practice* (LAG 2009), 37-39.

<sup>654</sup> Baroness Jean Corston, *The Corston Report: A Review of Women with Particular Vulnerabilities in the Criminal Justice System* (London. Home Office, NOMS/NPS 2006). This report was also commissioned by the Home Secretary after dramatic circumstances, namely the death of six women at Styal prison.

<sup>655</sup> Corston, *ibid.* For further comments on the Corston report, see e.g. Jill Annison and others, *Women and Criminal Justice: From the Corston Report to Transforming Rehabilitation*, Jill Annison and others eds. (1st ed., Bristol University Press, Bristol, 2015); Rachel Goldhill, 'The Corston Report — Reading between the Lines: Towards an understanding of Government policy in relation to vulnerable women offenders' (2009), 184 *Prison Service Journal*. Nick Hardwick commented in a lecture at the University of Sussex how the Corston Report was crucial to introduce some much-needed reform in the structuring and management of women's prisons, yet five years after the publication of the Report, prison remains a place not suitable for vulnerable categories of women: Nick Hardwick, *Women in Prison: Corston Five Years On*, 29 February 2012, at [<https://www.justiceinspectorates.gov.uk/prisons/wp-content/uploads/sites/4/2014/02/women-in-prison.pdf>], accessed 2 September 2019.

The HRA was introduced in the UK legal system in order to overcome the lack of a Bill of Rights and avoid undertaking a lengthy and costly procedure to enforce the ECHR.<sup>656</sup> Before the entry into force of the HRA, the Convention and case law of the ECtHR could be used in a judicial decision as an instrument to support the interpretation of ambiguous legislation in line with international obligations; to provide assistance with the “judge-made part of the common law”; and to exercise judicial discretion in a way that could uphold the ECHR.<sup>657</sup>

The adoption of the HRA extended the influence of Convention rights and of the Strasbourg judges’ case law by incorporating the ECHR within the English system. Section 2 of the HRA affirms that the ECtHR judgments and interpretation of the Convention, along with decisions and opinions of other Convention bodies, must “be taken into account” by UK Courts in assessing cases considering the application of the HRA.<sup>658</sup> This provision brings into the domestic system Convention rights, but the wording of S. 2 implies that ECtHR case law is not strictly binding on national courts. The provision serves to make sure that Convention rights under the HRA are enforced in the same way as in Strasbourg, but it is not meant to attach to the ECHR an autonomous national meaning.<sup>659</sup>

Section 3 is fundamental to understand the effects of the HRA, as it establishes that all past and future acts of Parliament shall be made compatible with the Convention, meaning that the Courts should interpret legislation in the way that ensures human rights are protected under the HRA, even when a statutory instrument does not expressly state so.<sup>660</sup>

The fact that the Convention must be given effect whenever possible had the consequence of introducing the Strasbourg judicial reasoning technique within the UK legal system. Therefore, the principle of proportionality, which requires the balancing of individuals’ rights against the rights of others and the public interest, has acquired great prominence. UK courts must first identify the Convention right under analysis, and the State’s positive obligations to fulfil it, for then enucleating a possible interference with that right and verify whether that interference complies with the principle of legality and necessity, and if it is proportionate to the suited aim.<sup>661</sup>

This process of internalisation should be especially relevant for the identification of prisoners’ rights, and of prisoners’ legal status. Indeed, the HRA applies when litigants are either private persons or public authorities.

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<sup>656</sup> John Wadham, Helen Mountfield, Caoilfhionn Gallagher, Elizabeth Prochaska, *Blackstone’s Guide to The Human Rights Act 1998* (fifth edition, Oxford University Press 2009), at 6-7.

<sup>657</sup> David Hoffman and John Rowe QC, *Human Rights in the UK – An Introduction to the Human Rights Act 1998* (3<sup>rd</sup> edition, Pearson Education Limited 2010), 51-53. The Human Rights Act (HRA) presents a partial incorporation of the ECHR, as Art. 1 and 13 have not been included within the actionable rights (the obligation to respect human rights and the right to an effective remedy).

<sup>658</sup> Human Rights Act 1998 (HRA), Section 2 (1).

<sup>659</sup> This allows taking into consideration the changing interpretation of Convention rights through time, as well as the possibility that the UK Courts would interpret a human rights provision more favourably, or differently, than the ECtHR would do, but they would refer to common law or to statutory interpretation. See *R (Ullah) v Special Adjudicator* [2004] 2 AC 323. See John Wadham and others, n.656, at 58-59.

<sup>660</sup> HRA, n.658, S. 3.

<sup>661</sup> Wadham and others, n.656, at 59.

The HMPPS and related bodies regulating or monitoring prisons have clearly a public purpose and can thus be qualified as public authority.<sup>662</sup>

Section 6 requires public authorities to “act compatibly with the Convention unless they are prevented from doing so by statute”.<sup>663</sup> This gives rise to a positive obligation upon public authorities to give effect to Convention rights. A failure to comply with the ECHR by public bodies would constitute ground to begin a judicial review process.<sup>664</sup>

The obligation to consider the ECHR in assessing alleged violations of prisoners’ human rights opened new opportunities for inmates, who have now the possibility to call for recognition of their legal status by relying on the ECtHR interpretative framework, which explicitly recognises both negative and positive rights.<sup>665</sup> They can apply a proportionality test developed in Strasbourg, based on a rigorous balance between the legality of individuals’ rights interference, and its necessity in relation to the pursued aim.<sup>666</sup> Whereas the UK Courts pre-HRA tended to adopt an interpretation of the deprivation of liberty that joined the analysis of the legal justification and of the administrative limitation of prisoners’ rights, the integration of Convention rights has led to the acknowledgment of two different plans of analysis: the proportionality of a deprivation of liberty and the legitimacy of measures limiting prisoners’ residual liberty.

This framework can potentially strengthen the relation between the construction of the international and the local sexual and gender diverse subject, raising important questions on how international and regional institutions frame gender and sexuality on one side, and how national authorities adapt these paradigms.<sup>667</sup>

Nevertheless, after the enactment of the HRA, the ECtHR still remains more progressive regarding prisoners’ rights, while there have not been significant changes to the Prison Act or Prison Rules.

Lazarus accounts for a stream of case law subsequent to the entry into force of the HRA that has continued conflating the analysis of limitation of prisoners’ personal liberty with the limitation of residual liberty via administrative policies. In *Simms*,<sup>668</sup> *Mellor*<sup>669</sup> and *Nilsen*,<sup>670</sup> judges undertook general considerations on the scope of the penal system in light of public perception to decide a case on a prisoner’s limitation to freedom of speech (*Simms*), or considered that it is within the Secretary of State’s discretion to determine whether certain rights should be limited by prison policies without necessarily having to be specified in statutes such

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<sup>662</sup> Hoffman and Rowe, n.657, at 77-78.

<sup>663</sup> Ibid., 12. See HRA, n.658, S. 6.

<sup>664</sup> HRA, ibid, S. 7.

<sup>665</sup> The English system has favoured the recognition and protection of negative rights over positive ones in relation to prison. This translated into the interpretation of such rights as emerging from the State’s negative obligation of non-interference – unless limitations were provided by law and necessary to ensure security – in prisoners’ rights. However, there was less appreciation of the positive duty of the State to actively protect these rights.

<sup>666</sup> Karamalidou points out that English courts used to apply the proportionality test by guaranteeing the State a wide discretion in regulating limitations to prisoners’ rights. See Karamalidou, n.640, at 29-30; see also Wadham and others, n.656.

<sup>667</sup> On the notion of cosmopolitan sexualities and differentiated universalism, see Plummer, n.23.

<sup>668</sup> *R v Secretary of State for the Home Department ex p Simms* [1999] 3 All ER 400.

<sup>669</sup> (*Mellor*) *v Secretary of State for the Home Department* [2001] 3 WLR 533.

<sup>670</sup> *Nilsen v Full Sutton Prison Governor* [2004] 154 NLJ 1788.

as the Prison Act (*Mellor and Nilsen*). In so doing, the principle of minimum interference of prisoners' rights as developed by the ECtHR became subject to political orientations, thus downgrading the fundamental effects of the principle of legality.<sup>671</sup>

A different interpretation started being elaborated in *Daly*,<sup>672</sup> which confirmed what was decided in *Leech* (*No. 2*) and made it clear that even if administrative orders can legitimately curtail prisoners' liberties to maintain order, this does not mean that such rights will not survive the enactment of the order. They are attenuated, but not erased. By stating that these rights can require more vigilant protection, the Lords also availed the recognition of positive rights within the UK system.<sup>673</sup>

Nevertheless, the way residual rights can be adequately protected within the prison legal framework remains open to interpretation, as the ECtHR does not offer particular guidance in this sense. Particularly, the human rights discourse related to gender and sexuality often relies on the State's margin of appreciation, and it is in itself supportive – to different extents depending on the subject – of a gender binary environment based on sex negativity.

In this perspective, the enactment of the Equality Act 2010 represented a major change for the protection of sexual minorities and transgender people. The EA was introduced after a review of existing legislation on equality and non-discrimination in order to consolidate main principles in one single coherent document.<sup>674</sup>

The Act provides definitions of each protected characteristics and of the different kinds of prohibited conduct. Section 12 covers sexual orientation, which is defined as

*a person's sexual orientation towards—*

*(a) persons of the same sex,*

*(b) persons of the opposite sex, or*

*(c) persons of either sex.*<sup>675</sup>

It includes both sexual attraction and behaviour. The Act also covers discrimination based on appearance or other manifestations of sexual orientation.<sup>676</sup>

Section 7 protects gender reassignment. It stipulates:

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<sup>671</sup> Lazarus, n.164, at 758-759.

<sup>672</sup> (*Daly*) v *Home Secretary*, n.647.

<sup>673</sup> Livingstone and others, n.635, at 24-25.

<sup>674</sup> John Wadham, Anthony Robinson, David Ruebain, Susie Uppal, *Blackstone's Guide to the Equality Act 2010*, John Wadham and others eds. (second edition, Oxford University Press 2012). At the time, there were nine major discriminatory laws, along with hundreds of statutory instruments and lengthy codes of practice. The parliamentary review also led to the establishment of the Commission for Equality and Human Rights.

<sup>675</sup> Equality Act 2010 (EA 2010), Section 12 (1).

<sup>676</sup> Wadham and others (2012), 29.

*A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.*<sup>677</sup>

The Act does protect people who are transitioning or identify as transsexual without requiring medical supervision and focusing on the transitioning process. It also states that reference to a transsexual person is equal to referring to the protected characteristic of gender reassignment.<sup>678</sup> The term “proposing to undergo” has been interpreted as covering various categories of individuals, even people who are not holders of a Gender Recognition Certificate,<sup>679</sup> do not intend to undergo medical surgery but manifest signs that they are changing their gender (e.g. clothing or behaviour), or are transgender people who live in accordance with their preferred gender.<sup>680</sup> Exceptions to the principle of equal treatment on the basis of gender reassignment can be applied to the right to access women-only spaces,<sup>681</sup> including prisons, if it is “proportionate in the means of achieving a legitimate aim”.<sup>682</sup> Thus, a blanket policy of locating trans inmates on the basis of their sex at birth rather than their gender identity would constitute direct discrimination in violation of the Act.

The EA 2010 is relevant to LGBTQ prisoners as it introduced a public sector equality duty covering also sexual orientation and gender reassignment, calling public authorities to protect these categories from direct as well as indirect discrimination,<sup>683</sup> harassment and victimisation.<sup>684</sup> It formed the legal basis to introduce prisoners and

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<sup>677</sup> EA 2010, S. 7 (1).

<sup>678</sup> Ibid, S. 7(2).

<sup>679</sup> Alex Sharpe, *Legal Arguments that Gender Self-Declaration Undermines Women's Rights are Seriously Flawed*, Inherently Human, 15 October 2018, at [<https://inherentlyhuman.wordpress.com/2018/10/15/legal-arguments-that-gender-self-declaration-undermines-womens-rights-are-seriously-flawed/>], accessed 20 November 2019.

<sup>680</sup> Wadhman and others (2012).

<sup>681</sup> EA 2010, S. 7

<sup>682</sup> Ibid, S. 3.

<sup>683</sup> The EA 2010 clarifies the meaning of these terms. Direct discrimination corresponds to the more classic notion of discrimination, when two people are treated differently, and the reason why one is treated less favourably depends on having protected characteristics (S. 13(1)). On the other hand, indirect discrimination has a more substantial effect, tackling those practices that are apparently neutral, but in practice put people with a protected characteristic at disadvantage. According to S. 19, these practices shall be considered discriminatory unless they can be justified. Justification implies that the person or authority applying that provision must be able to demonstrate its proportionality, i.e. that it is a proportionate means to achieve a legitimate aim. See e.g. *Osborne Clarke Service v A Purohit* [2009] IRLR 341.

<sup>684</sup> As will be explored in the data analysis, episodes of harassment or victimisation were reported in the participants' accounts. The EA2010 gives a definition of these terms. The Act describes at S. 26 three different types of harassment: one related to a protected characteristics; sexual harassment; and less favourable treatment because of a person's reaction to harassment. The first type of harassment relates to a conduct that violates the person's dignity, or creates “an intimidating, hostile, degrading, humiliating or offensive environment for a person”. The conduct, which can manifest in writing or orally, must be “unwanted,” but the victim shall demonstrate that they expressly object to that behaviour. Harassment can originate either as purpose or effect of the conduct. Courts clarified that even one incident that is “sufficiently serious” can qualify as harassment. See Wadhman and others, n.674, at 48-49. Victimisation is approached from a different angle, as it is not related to treatments linked with protected characteristics, instead it aims to protect people who exercise their rights under the Act or assist others in doing so. It seeks to encourage people who suffer from discrimination to use the Act instruments without fear of intimidation. Conducts qualifying as victimisation are listed at S. 27. Overall, victimisation takes place when a person is subject to detrimental behaviour as it is believed to have done, or to be about to do, a protected act. Claiming that a person has contravened one of the EA provisions is an example of a protected act. To demonstrate that detrimental behaviour took place, it is not necessary to compare the experience claimed to be a form of victimisation with the treatment of another person. Thus, if other persons would have been treated the same way regardless of discrimination, this does not exclude that victimisation took place at the claimant's disadvantage.



prison staff's representatives for each protected characteristic.<sup>685</sup>

More precisely, S. 149 clarifies:

*A public authority must, in the exercise of its functions, have due regard to the need to—*

*(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;*

*(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;*

*(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.*

The use of the expression “due regard” implies that public authorities shall not only remove obstacles or disadvantages suffered by people possessing one or more protected characteristics, but also act positively to meet the specific needs of these categories, which can be different from those of other people.<sup>686</sup> In other words, equality shall be implemented both through protection from discrimination or other violations against protected characteristics, and by promoting equal opportunities to everyone.<sup>687</sup>

The EA 2010 is strongly connected with the HRA: the former must be interpreted by the Courts in accordance with the ECHR, and the government had to declare a statement of compatibility with the ECHR when the Equality Bill was presented in Parliament.<sup>688</sup> Finally, Convention rights, such as the prohibition of torture, the right to private and family life, and the non-discrimination principle, raise issues of identity, expression of identities and equality that overlap with the scope and values protected by the EA 2010.<sup>689</sup>

The deeper integration of Convention rights and the adoption of the EA 2010 contributed to the highlighting of the conditions of sexual minorities and transgender inmates. The work of independent monitoring bodies also represented a core factor to denounce human rights violations affecting LGBTQ prisoners. The Prison and Probations Ombudsman has been particularly active in this sense. In its Annual Reports, it regularly cites data concerning these groups. It reported the deaths of three transgender women in male prisons and acknowledged that some complaints from transgender prisoners concern issues related to transphobic behaviour from staff. It further stressed that gay prisoners should have the right to be open about their sexuality even if this offends other prisoners, inviting a change of policy on the subject.<sup>690</sup>

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Ultimately, it is sufficient that the protected act caused victimisation and not necessarily that it has motivated the discriminatory treatment.

<sup>685</sup> The public sector duty is contained in S. 149 of the EA 2010.

<sup>686</sup> EA 2010, S. 149 (3).

<sup>687</sup> Wadham and others, n.674, at 152-156.

<sup>688</sup> In compliance of S. 19 of the HRA (n.658).

<sup>689</sup> Wadham and others, n.674, at 243-244.

<sup>690</sup> Prisons and Probation Ombudsman (PPO), Annual Report 2017-18, Presented to Parliament by the Secretary of State for Justice by Command of Her Majesty, October 2018; PPO Annual Report 2010-2011, Presented to Parliament by the Lord Chancellor and Secretary of State for Justice by Command of Her Majesty, July 2011.

A statutory framework of explicit protection against discrimination based on sexual orientation and gender reassignment is a major element of differentiation between the English and Italian legal systems.

## 5.2 Sources of the Italian legal system

Penitentiary law constitutes an organic legal framework grounded first and foremost in the Italian constitutional principles, as well as in international sources.<sup>691</sup>

Therefore, in order to understand the foundational standards of the Italian penal system, it is necessary to provide a brief overview of the legal sources that inform prison law and policies in Italy.

Italian law and jurisprudence are entrenched in the civil law tradition. Unlike a typical common law system such as the United Kingdom, civil law systems are grounded in written rules organised in a hierarchical structure and usually codified.<sup>692</sup> In the Italian legal framework, at the top of this pyramid there is the Constitution, the primary source of law that determines the fundamental principles informing Italian citizens' lives; it establishes that statutes are a source of primary importance as an expression of the power of Parliament, a legislative body composed by the Chamber of Deputies and by the Senate, whose members are elected by the Italian citizens who are entitled to the right to vote.<sup>693</sup> Indeed, the election of members of Parliament is an expression of the sovereignty of Italian people through representative democracy.<sup>694</sup>

Alongside the Parliament, the Constitution attributes the executive power to the Government.<sup>695</sup> It can adopt regulations, i.e. administrative acts that cannot contradict the law, in line with the principle of sovereignty, according to which the sovereignty belongs to Italian people, who can exercise it in the forms and within the limits of the Constitution.<sup>696</sup>

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<sup>691</sup> Leonardo Filippi, Giorgio Spangher, M Francesca Cortesi, *Manuale di Diritto Penitenziario* (IV ed., Giuffr  2016), at 1.

<sup>692</sup> Paolo Caretti, Ugo de Siervo, *Diritto Costituzionale e Pubblico* (III ed., Giappichelli, Torino 2017).

<sup>693</sup> Roberto Bin, Giovanni Pitruzzella, *Le Fonti del Diritto* (III ed. Giappichelli 2019) at 17-18. Caretti and de Siervo explain that only those norms that are included in legal acts to which the system in itself has attributed a normative power can be considered a legal source. For example, in case of conflict between a law passed by the Parliament and a regulation adopted by the government, the law supersedes the regulation, as the law is hierarchically superior as compared to the regulation. Therefore, a regulation cannot discipline issues reserved to the competence of the law. If a regulation is in contrast with a legislative provision, the regulation is invalid. Caretti and de Siervo, n.692, at 13. Bin and Pitruzzella (2019), 195-200.

<sup>694</sup> Also through the exercise of direct democracy in very circumscribed circumstances through the referendum as regulated by Art. 75 Constitution. Nevertheless, not all the power is concentrated on the Parliament, as the Constitution supports the majoritarian principle, which entails that political minorities shall be represented and their rights protected, also by preserving a decision process based on transparency and openness. See Crisafulli V, Paladin L, Bartole S, Bin R, *Commentario alla Costituzione* (II edition, CEDAM 2006).

<sup>695</sup> The government is composed of the President of the Council and its Ministers, which together form the Council of Ministers. The President of the Council is not directly elected by Italian citizens, but is nominated by the President of the Republic. See Art. 92 Italian Constitution. Usually, the President of the Republic appoints a President of the Council who is an expression of the political party or coalition that obtained the parliamentary majority after elections.

<sup>696</sup> Constitution of the Italian Republic, 1 January 1948. (Special issue Gazzetta Ufficiale della Repubblica 27 December 1947), Art. 1. Italian citizens have the power to elect their representatives in Parliament, whereas the Government

### 5.2.1 The legal sources: primary and secondary legislation

The Constitution was drafted after the horrors of the Second World War by a Constituent Assembly reuniting all those political forces that fought against the Fascist party.<sup>697</sup>

One core principle that the Assembly decided to introduce in the legal system is that the Constitution cannot be modified by an ordinary act of parliament, but there needs to be a special procedure.<sup>698</sup> A statutory act shall comply with the constitutional principles, while the Constitution explains the procedure to pass it, and the limits of its content.<sup>699</sup>

Consequently, the Constitution introduced the principle of the rule of law, providing for particularly important issues to be regulated only by law (absolute rule of law); in relation to other subjects, it prescribes that the core principles shall be included in the law, while more detailed provisions can be enacted through secondary sources. This usually consist of regulations that can be adopted by the government or even by individual Ministers or groups of Ministers within the government (relative rule of law).<sup>700</sup>

### 5.2.2 Legal acts adopted by the Government having the same force of law

The Constitution prescribes special conditions when the Government is directly involved in the legislative process and can adopt acts that have the same force of law. More precisely, the Parliament can delegate the executive branch to pass legislative acts called legislative decrees.<sup>701</sup> Additionally, in cases when there is extreme necessity and urgency to introduce a norm with the force of law, the Government can adopt a law decree that must be transposed into law by Parliament within 60 days of its publication.<sup>702</sup>

Legislative decrees are adopted by the Government in relation to complex issues that the executive branch can examine with more technical competence, such as a code, or the reform of an administrative branch of the

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exercises its functions only to the extent that it has the confidence of both Houses of the Parliament: see Art. 94 Constitution. Bin and Pitruzzella, n.693, at 17-18. Renato Alessi and others, *Scritti giuridici in memoria di Vittorio Emanuele Orlando* (CEDAM 1957), at 424. Article 1 further specifies that the Italian State is republican, democratic and based on popular sovereignty. This means that the Italian State should be informed on democratic values. See Livio Paladin, *Diritto Costituzionale* (CEDAM 1998), at 260.

<sup>697</sup> Paladin, *ibid.*

<sup>698</sup> Constitution of the Italian Republic, n.696, Art. 138-139. In this context, the term “act of Parliament” is the more accurate translation of the Italian word “legge,” which could refer both to an act of Parliament and to the set of principles regulating human behaviour.

<sup>699</sup> Caretti and de Siervo, n.692, at 187. Paladin, n.696.

<sup>700</sup> *Id.*, at 18-19. Regulations are disciplined at art. 117 Constitution, and in more details, by law 400/1988, which set up the rules concerning legal acts that can be adopted by the Government.

<sup>701</sup> Constitution of the Italian Republic, n.696, Art. 76.

<sup>702</sup> *Ibid.*, Art. 77. During the transposition process, the Houses can amend the original text of the decree, while if the decree is not transposed, the Parliament may still regulate the legal relations arisen from the rejected measure. For further details, see Crisafulli and others, n.694.

executive.<sup>703</sup> The extent of the delegated powers is specified by the Parliament in a delegation law. This establishes the principles and criteria the Government shall comply with in adopting the legislative decree.

### 5.2.3 The role of the judiciary

Historically, in a civil law system where the Constitution is the foundational norm, the judiciary does not create the law, but limits itself to interpret and apply it to the specific circumstances of the case.<sup>704</sup>

However, the introduction in the 20<sup>th</sup> century of various forms of judicial review, including constitutional review, has had a profound impact on the role of the judiciary, which are not only “negatively legislating”, but contribute actively to the decision-making process. The judicialisation phenomenon represents a crucial aspect of constitutionalism, where social conflicts are debated in courtrooms by using a global language of rights.<sup>705</sup>

Litigants before an ordinary judge<sup>706</sup> (or ordinary courts on their own initiative) can challenge the constitutionality of a law applied in their case and the courts must assess whether there are constitutional grounds to refer the case to the Constitutional Court, the highest court in matters of constitutional law.<sup>707</sup>

Unlike the Constitutional Court, the *Corte di Cassazione* (the highest court of appeal or court of last instance) makes sure that the law is applied correctly and interpreted uniformly by the ordinary judge deciding on the merits.<sup>708</sup> In practice, the decisions of the *Corte di Cassazione* are highly influential and considered settled case law, particularly when the Court decides in its grand chamber formation (*Sezioni Unite*).<sup>709</sup>

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<sup>703</sup> Crisafulli, id. 276-277.

<sup>704</sup> Ibid.

<sup>705</sup> See e.g. Carlo Guarnieri, *Courts and marginalized groups: Perspectives from Continental Europe* (2007), 5 International Journal of Constitutional Law 2, 187 - 210. On the impact that judicialisation and the global diffusion of human rights have on the structure and relation between sources of law, see Angioletta Sperti, *Omosessualità e diritti. I percorsi giurisprudenziali e il dialogo globale delle Corti costituzionali* (Pisa University Press, 2013), .

<sup>706</sup> This term intends to refer both to the judge of first instance and to the appeal judge.

<sup>707</sup> Crisafulli and others, n.694. The Constitutional Court was introduced in the Italian republican only with the enactment of the Constitution in 1948, but it became operative years later, with the passing of the Constitutional Law n. 1 of 1953 and the Law n. 87 of 1953. The first hearing took place in 1956.

<sup>708</sup> This power is called *nomofilachia*. A complaint can be appealed before the *Corte di Cassazione* only based on specific grounds prescribed by law, such as the infringement of substantive or procedural law, or errors in the statement of reasons for the decision. If the Court ascertains that the appealed provision violates the law for one of these reasons, not only shall the Court overturn the decision of the ordinary judge, but also assert the correct legal principle. For an exhaustive explanation of the role and powers of the Court, which go beyond *nomofilachia*, see the *Corte di Cassazione* website, at [<http://www.cortedicassazione.it/corte-di-cassazione/it/homepage.page?jsessionid=EFA23B39A03B17898E7F9D7298D9F98E.jvm1>], accessed 16 January 2020. I use the Italian name *Corte di Cassazione*, as the Court has specific powers that do not coincide with the ones of the English court of last instance, the Supreme Court.

<sup>709</sup> The Court generally decides in the simple chamber or division (*sezione semplice*), composed of five members. However, for particularly relevant questions, or for issues that have seen contrasting interpretations of similar circumstances issued by various divisions, the Court gathers in joint sitting, presided over by the First President and composed of nine members. For further details, see the *Corte di Cassazione* website, at [[http://www.cortedicassazione.it/corte-di-cassazione/it/organizzazione\\_della\\_corte.page](http://www.cortedicassazione.it/corte-di-cassazione/it/organizzazione_della_corte.page)], accessed 3 June 2019.

#### 5.2.4 Supranational sources and their relationship with the national legal framework

The Italian system entertains a constant and close dialogue with international and European sources. This relationship is based on the application of the “competence” criterion.<sup>710</sup>

Rules of general application that are accepted by the international community as international law (i.e. international customs) are automatically internalised within Italian law, according to art. 10 Constitution:

*The Italian legal system conforms to the generally recognised principles of international law.*<sup>711</sup>

This article makes international norms hierarchically superior to ordinary law; yet, international law cannot stand in contrast to fundamental principles of the Italian constitutional order.<sup>712</sup>

On the other hand, international norms arising from international agreements must be integrated within the national system through the enactment of domestic legislation.<sup>713</sup> Art. 11 Constitution has been interpreted as a vehicle for international agreements and European Union (EU) law to be internalised domestically:

*Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organisations furthering such ends.*<sup>714</sup>

The Constitutional Court further clarified that once international agreements are internalised in the domestic system, they cannot be modified by subsequent ordinary law, as national law shall comply with international obligations. The Court grounded its reasoning on art. 117 (1) Constitution:<sup>715</sup>

*Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations.*<sup>716</sup>

This interpretation is essential to clarify the relationship between Italian law and the ECHR, particularly regarding the enforcement of the case law of the ECtHR.

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<sup>710</sup> Bin and Pitruzzella, n.693, at 27.

<sup>711</sup> Constitution of the Italian Republic, n.696, Art. 10 (1).

<sup>712</sup> Constitutional Court, sent. 12 June 1979, n. 48.

<sup>713</sup> See Bin and Pitruzzella, n.693, at 188.

<sup>714</sup> Constitution of the Italian Republic, n.696, Art. 11(2). As explained in Chapter 4, EU law will not be examined in this thesis.

<sup>715</sup> Constitutional Court, 22 October 2007, sent. n. 348 and 349; Bin and Pitruzzella, n.693, at 42; Caretti and de Siervo, n.692. With these two historic decisions (commonly known as “twin sentences”), the Constitutional Court reversed its previous interpretation regarding the relationship between national sources and international agreements ratified by Italy subsequently made effective domestically via an ordinary law. The previous jurisprudence of the Court affirmed that international treaties acquire the same position in the Italian legal system as the source that transposes them into the Italian legal framework. Therefore, if they were introduced through an ordinary law, they had the same force and effects as ordinary laws, and could be later modified by a national law or other source with the same effects of the law. See Constitutional Court, sent. 18 May 1989, n. 323.

<sup>716</sup> Constitution of the Italian Republic, n.696, Art. 117 (1). This thesis does not address the relationship between EU law and Italian law, as the former has not addressed the issue of the treatment of LGBTQ prisoners.

### 5.2.5 The European Convention of Human Rights and its place in the system of Italian sources of law

The legal debate concerning the place of the ECHR within the system of Italian sources of law is particularly important to assess to what extent and in what ways the ECtHR decisions are internalised and applied by domestic actors.

As seen above, the Constitutional Court has specified that international agreements have a particular place within the national system of legal sources. The Convention is part of the CoE system and is qualified by the Constitutional Court as “primary source”, stressing the “speciality” of the ECHR as compared to all other international treaties. Indeed, the Convention has attributed to a specific judge the competence to interpret the Convention, which shall be interpreted as a “living instrument” by the Constitutional Court in light of the interpretation of the ECtHR.<sup>717</sup>

Therefore, a national judge who deals with the relationship between domestic and supranational principles has to address the ECtHR interpretation of the ECHR, and shall consider the evolutive interpretation of the Convention rights, due also to the short prescriptions of the Convention that do not leave room for adopting a textual or historic interpretation.<sup>718</sup> At the same time, the Constitutional Court clarified that in case of contrasting case law, when Italian laws and judgments offer a stronger protection than Strasbourg jurisprudence, the Italian law must prevail. Otherwise stated, the relationship between international and constitutional protections shall result in opting for the interpretation that offers the maximum protection to individuals.<sup>719</sup>

It has also been stated that the Constitutional Court should consider the substantial meaning of the European norm, thus leaving room for a margin of appreciation that allows the State to adapt European jurisprudence to the particular characteristics of the Italian legal system<sup>720</sup> (however, the Court has adopted a different approach in a more recent judgment, stating that the obligation to consider the ECHR in its interpretation applies only

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<sup>717</sup> See Roberto Romboli, ‘L’Influenza della CEDU e della Giurisprudenza della Corte Europea dei Diritti Umani nell’Ordinamento Costituzionale italiano’ (2018), 3 Consulta Online.

<sup>718</sup> Giorgio Repetto, ‘Premesse ad uno studio sull’interpretazione evolutiva tra Costituzione e Convenzione europea dei diritti dell’uomo’, in Luisa Cassetti ed., *Diritti, principi e garanzie sotto la lente dei giudici di Strasburgo* (Napoli, Jovene, 2012), 21 and following. Nevertheless, the Constitutional Court has a tendency to represent itself as “the Supreme Court among the others”. In Const. court, sent. 26 March 2015, n. 49, the judges affirmed that it is desirable to reach a convergence between the courts in order to protect fundamental rights; yet, in extreme cases when such convergence is not achievable, the national judge shall comply with Constitutional values. Ruggeri criticises this approach as unproductive and not thought-through. See Antonio Ruggeri, ‘Corte europea dei diritti dell’uomo e giudici nazionali, alla luce della più recente giurisprudenza costituzionale (tendenze e prospettive)’ (2018), in 1 Osservatorio costituzionale AIC, 5 February 2018.

<sup>719</sup> Const. Court, sent. 30 November 2009, n. 317. Thus, the Constitutional Court can distance itself from the ECHR interpretation offered by the European Court in Strasbourg, every time the Constitutional Court believes it necessary to balance the interpretation of the single norm against the legal domestic context as a system of values that the norm under judicial analysis affects. Const. Court, sent. 317/2009 and sent. 19 November 2012, n. 264.

<sup>720</sup> Const. Court, sent. 22 July 2011, n. 236; Const. Court, sent. 26 November 2009, n. 311. This case law elaborates on the reasoning of the so-called “twin sentences” (see note 774), where the Constitutional Court specified that the interpretation of the ECHR and ECtHR judgment must balance international obligations and other constitutionally protected interests. Pierfrancesco Rossi, ‘L’interpretazione conforme alla giurisprudenza della Corte Edu: quale vincolo per il giudice italiano?’ (2018), 1 Osservatorio sulle fonti.

to certain types of ECtHR decisions, such as pilot judgments, which proves the complex relation between the two judicial bodies).<sup>721</sup>

Romboli observes that the role of the ECtHR has evolved through time from an internationalist nature to a constitutionalist one.<sup>722</sup> He distinguishes between a first phase where the Court focused on individual rights by issuing decisions acknowledging a violation of the Convention and imposing a form of reparation upon the State to the applicant, and a more recent development where the Court started taking into account substantial systemic changes beyond reparation to the individual violation. For example, the Court can impose to the respondent State a positive obligation to modify its legal framework in order to respect the Convention.<sup>723</sup> This shift is particularly important in relation to prisoners' rights, as the Court has been crucial to set in motion the reform process leading to the recent modification of the Italian prison law.

### 5.3 Sources of the Italian penitentiary system

The description of the sources of law presented above, and of the relationship between the CoE system and Italian national legislation, is necessary to understand the role of the main sources regulating Italy's prison system.

The main piece of legislation regulating the prison system is law 354/1975<sup>724</sup> as recently modified with the enactment of legislative decrees 2 October 2018 nos 121, 123 and 124.<sup>725</sup> An executive regulation has been subsequently adopted to provide administrative rules on the prison system and other measures to deprive or limit personal liberty.<sup>726</sup> Finally, Prison Service Instructions (*circolari*) regulate specific aspects of prison life.

Constitutional principles, such as the right to liberty, relevant to criminal law – and the CJS as a whole – find application also in relation to the treatment of prisoners. The entry into force of the Constitution allowed re-conceptualising of the normative dimension of imprisonment,<sup>727</sup> principally on the basis of three provisions: the recognition of the inviolable rights of the person, both as an individual and in social groups where human

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<sup>721</sup> Const. Court, sent. 26 March 2015, n. 49.

<sup>722</sup> Romboli, n.717, at 635.

<sup>723</sup> Ibid.

<sup>724</sup> Italian Law on Prison, n.394.

<sup>725</sup> See Legislative Decree 121, 123 and 124 (Official Gazette, 26 October 2018, n. 250. Ordinary Suppl. n. 50). In particular, Legislative Decree 121 provides norms in the area of youth justice; Leg. Decree 123 introduced new provisions on healthcare and prison life; and Leg. Decree 124 concerns additional provisions on prison life and prison labour.

<sup>726</sup> Decree of the President of the Republic (DPR) 30 June 2000, n. 230 (Official Gazette 22 August 2000, n. 195) ("Regolamento recante norme sull'ordinamento penitenziario e sulle misure privative e limitative della libertà").

<sup>727</sup> Marco Ruotolo, *Dignità e carcere* (II ed. Editoriale Scientifica 2014).

personality is expressed;<sup>728</sup> the principle of equality;<sup>729</sup> and the principle that punishments may not consist of treatments contrary to the sense of humanity and shall aim at re-educating the convicted person.<sup>730</sup>

The Constitutional Court specified that human dignity as an inviolable right constitutes the foundation of the principle of humanity and rehabilitation in the execution of punishment.<sup>731</sup>

As seen above, the Constitution also prescribes the importance of recognising international norms based on international customary law<sup>732</sup> that do not contrast with fundamental principles of the Italian constitutional system,<sup>733</sup> and of international treaties including provisions imposing a limitation to State sovereignty.<sup>734</sup> Most importantly, Art. 117 Const. reiterates that the legislative power shall be exercised by respecting not only the Constitution, but also international obligations, including the ECHR. This principle is of relevance for prisoners' rights, as the Constitutional Court and Italian legislative and executive power had to confront several ECtHR judgments<sup>735</sup>, eminently *Torreggiani*,<sup>736</sup> condemning Italy for the poor conditions of its prisons.

Before the adoption of the Constitution, the prison system was conceptualised as a separate and isolated environment from the free society. Such a split mirrored the legal framing of the relationship between the State

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<sup>728</sup> Constitution of the Italian Republic, n.696, Art. 2: “La Repubblica riconosce e garantisce i diritti inviolabili dell’uomo, sia come singolo, sia nelle formazioni sociali ove si svolge la sua personalità”, e richiede l’adempimento dei doveri inderogabili di solidarietà politica, economica e sociale” (The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled)

<sup>729</sup> Constitution of the Italian Republic, n.696, Art. 3: “Tutti i cittadini hanno pari dignità sociale e sono eguali davanti alla legge, senza distinzione di sesso, di razza, di lingua, di religione, di opinioni politiche, di condizioni personali e sociali.” (All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country.) The Constitutional Court referred to art. 3 in many instances to support the declaration of unconstitutionality of penitentiary law provisions. See Filippi and others, n.691, at 2-3.

<sup>730</sup> Constitution of the Italian Republic, n.696, Art. 27 (3): “Le pene non possono consistere in trattamenti contrari al senso di umanità e devono tendere alla rieducazione del condannato” (Punishments may not be inhuman and shall aim at re-educating the convicted).

<sup>731</sup> Const. Court, sent. 22 November 2013 n. 279.

<sup>732</sup> Constitution of the Italian Republic, n.696, Art. 10(1): “L’ordinamento giuridico italiano si conforma alle norme del diritto internazionale generalmente riconosciute.” (The Italian legal system conforms to the generally recognised principles of international law). Const. Court, sent. 5 December 1961, n. 68 and order 11 February 1993, n. 75.

<sup>733</sup> Const. Court, sent. 12 June 1979, n. 48.

<sup>734</sup> Constitution of the Italian Republic, n.696, Art. 11: L’Italia [...] consente, in condizioni di parità con gli altri Stati, alle limitazioni di sovranità necessarie ad un ordinamento che assicuri la pace e la giustizia fra le Nazioni [\(U\)](#); promuove e favorisce le organizzazioni internazionali rivolte a tale scopo. (Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organisations furthering such ends).

<sup>735</sup> See e.g. *Sulejmanovic v Italy*, App. No. 22635/03 (ECtHR, 16 July 2009); *Labita v. Italy*, App. No. 26772/95 (ECtHR, 6 April 2000), condemning Italy for implementing practices of censorship of prisoners’ correspondence without legal basis; *Messina v Italy (no 2)*, App. no. 25498/94 (ECtHR, 28 November 2000), where the Court found that a blanket ban on family visits constitutes a breach of Art. 8 of the Convention.

<sup>736</sup> *Torreggiani and others v Italy*, App. nos. 43517/09, 46882/09, 55400/09 et al. (ECtHR, 8 January 2013) (*Torreggiani v Italy*). Particularly, the ECtHR acknowledged that living conditions in Italian prisons were not tolerable and violated Art. 3 ECHR for serious overcrowding, as stated especially in the *Torreggiani* case. Before the legislative power introduced modifications to the prison system, the judgment was used by applicants to claim that their human rights were violated before national ordinary judges, who on at least two occasions referred the issue to the Constitutional Court through the process described in the previous section, on the basis of a violation of Art. 2, 3 and 27(3) of the Italian Constitution, and Art. 117 in light of the Convention rights. See e.g. Const. Court, sent. 279/2013, n.731.



and prisoners as one of “special supremacy” outside the legal guarantees offered to free citizens.<sup>737</sup>

On the contrary, the explicit citation of the principle of re-education and respect for prisoners’ humanity has placed the individual human being at the core of prison legislation and policies. More specifically, the Constitution linked the principle of rehabilitation with the overarching principle of human dignity and equality. Regardless of the fact that prisoners have been deprived of their liberty, the prison regime shall ensure that these core rights are respected. Particularly, the notion of human dignity entails a static dimension– i.e. respecting any persons for the fact of being human – and a dynamic component, where the State shall ensure that prison policies and prisoners’ actions towards rehabilitation are informed on the respect of someone’s personality and freedom.<sup>738</sup> To act with dignity, everyone must be afforded the conditions to express their own skills and personality with dignity.

However, the definition of re-education provided by Art. 27 Constitution remains quite broad. For many years, it was unrelated to the penitentiary system, as the prevailing political and social climate was inclined to qualify punishment as a form of retribution for the committed crime, while relegating rehabilitation to a residual role. Furthermore, the language adopted by the drafters of the Constitution left room for different interpretations of Art. 27. Initially, the Constitutional Court defined re-education merely as a warning that punishment shall not become less than humane,<sup>739</sup> and did not qualify the re-education principle as absolute.<sup>740</sup>

With sentence 313/1990, the Italian highest Court changed its approach. It introduced the notion of “multifunctional nature of punishment” and highlighted the innovation entrenched in the principle of re-education; it stated that this cannot be overlooked as it constitutes an essential element of punishment also in light of human rights standards that are intrinsic to the European legal culture. These conclusions complemented what the Court already stated with sentence 204/1974 by clarifying that punishment should aim for the social reintegration of the convicted person. Similarly, the *Corte di Cassazione* formally recognised the “right to re-education” and identified positive obligations upon the Prison Service to realise this principle.<sup>741</sup>

The Court’s interpretation of art. 27 (3) Constitution ensured that prisoners can obtain sufficient judicial safeguards against every act of the Prison Administration.<sup>742</sup>

It should follow that limitations of personal freedom based on security considerations must seek to recognise the individual’s various forms of expression of their human dignity.<sup>743</sup>

In spite of the progressive interpretation of case law, and the rehabilitation aim underpinning the 1975 law on

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<sup>737</sup> Ruotolo, n.727, at 5; Giorgio Berti, *Interpretazione costituzionale* (CEDAM 1987).

<sup>738</sup> Ruotolo, *ibid*, at 20-25; Paolo Becchi, *Il Principio di Dignità Umana* (Morcelliana, Brescia 2009); Gianni Ferrara, ‘Diritto Soggettivo, Diritto Oggettivo. Uno sguardo sugli apici del giuridico’, [www.costituzionalismo.it](http://www.costituzionalismo.it), 14 September 2008.

<sup>739</sup> Const. Court, sent. 12 February 1966, n.12.

<sup>740</sup> *Ibid*.

<sup>741</sup> Corte di Cassazione, penal section, sent. 1 July 1981; 24 March 1982; 29 March 1985.

<sup>742</sup> Ruotolo, n.727, at 45.

<sup>743</sup> Alessandro Baratta, ‘Diritto alla sicurezza o sicurezza dei diritti?’ In Anastasia S, Palma M, *La bilancia e la misura*, Milano 2001.

prison, the overall penal system continued favouring retribution over rehabilitation, and the execution of punishments through imprisonment rather than alternatives to imprisonment. This is reflected by decisions concerning prison buildings design, political parties' agenda on crime and punishment, and by the judiciary tendency to over-rely on prison sentencing, also due to some legal automatisms provided by the law that oblige the judge to issue a prison sentence when certain conditions are met, without the possibility of the judge exercising their discretionary power.<sup>744</sup>

### 5.3.1 The European Court of Human Rights enters the debate on prison reform: the *Sulejmanovic* and *Torreggiani* cases

The systematic problems of the Italian prison system determined the critical conditions affecting its penal estates, which are severely overcrowded and overstretched in respect of the available resources.

Prisoners suffering from these inhumane conditions filed lawsuits which reached the ECtHR after the exhaustion of domestic remedies. The Court first condemned Italy in the 2009 *Sulejmanovic* case,<sup>745</sup> and subsequently with the *Torreggiani* pilot judgment.<sup>746</sup> In both cases, the Court found Italy in violation of Art. 3 of the Convention. In *Sulejmanovic*, the Strasbourg judges concluded that placing prisoners in cells with a living space of less than 3 sq. m, together with five other prisoners, amounted to a breach of the Convention.

As an answer to the Court's remarks, the Italian Government declared a state of national emergency in 2010, and presented an Action Plan in 2011, later updated in 2012. The Plan illustrated a series of measures to face prison overcrowding and focused on alternatives to imprisonment, particularly house arrests for people serving the final part of long prison sentences. It also took into account the standards set out by the Committee for the Prevention of Torture and the ECtHR.<sup>747</sup>

The CoM of the CoE welcomed the enactment of these measures, but also called for more lasting solutions to overcrowded establishments.

The lack of effective, long-lasting interventions led to the *Torreggiani* case. Seven applicants filed a complaint to denounce not only the critical conditions of the prisons they had been placed in, especially in terms of dedicated personal space inside their cells, but they challenged the lack of hot water, and in some cases the inadequate lighting and absence of ventilation within their cells,<sup>748</sup> affirming that these conditions amounted to inhuman and degrading treatment.

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<sup>744</sup> See Glauco Giostra, 'La Riforma Penitenziaria. Il lungo e tormentato cammino verso la Costituzione' (2018), 4 Diritto Penale Contemporaneo. Angela Della Bella, 'Il Termine per Adempiere alla Sentenza Torreggiani si avvicina a scadenza: dall Corte Costituzionale alcune Preziose Indicazioni sulla Strategia da Seguire', Diritto Penale Contemporaneo, 19 December 2013, [<https://www.penalecontemporaneo.it/d/2715-il-termina-per-adempiere-alla-sentenza-torreggiani-si-avvicina-a-scadenza-dalla-corte-costituzional>], accessed 23 December 2019.

<sup>745</sup> *Sulejmanovic v Italy*, n.735.

<sup>746</sup> *Torreggiani v Italy*, n.736.

<sup>747</sup> Federica Favuzza, 'Torreggiani and Prison Overcrowding in Italy' (2017), 17 Human Rights Law Review, 153–173.

<sup>748</sup> *Torreggiani*, n.736, par. 8-16.

The ECtHR accepted the applicants' complaints. It qualified it as examples of "serious overcrowding" and concluded that the described conditions were inhuman. Contextually, the ECtHR stipulated that the remedies offered by the Italian State were inadequate.<sup>749</sup> The Court also highlighted the precarious conditions of Italian prisons. It focused on comments on the spatial and living situation the prisoners had to endure, aggravated by the insufficiency of outdoor activities besides the limited, non-hygienic space available in the prison visited by the Committee, along with the constant lack of privacy.<sup>750</sup>

The ECtHR mainly called for the Italian State to adopt preventive and reparatory measures to guarantee a real and effective remedy for human rights violations resulting from prison overcrowding. Preventive measures were required especially in terms of long-term systemic solutions.<sup>751</sup>

The Strasbourg judges noticed in particular that the Government did not take into account judicial admonitions for urgent actions, which remained ineffective.<sup>752</sup>

Due to the grave situation at hand, the Court issued the decision in the form of a pilot judgment in accordance with Art. 46 ECHR. This procedure is adopted by the ECtHR when there is a structural and systemic problem affecting a State party to the Convention, which provokes an overflow of applications concerning the same issue, as happened in the case of overcrowding of Italian prisons.<sup>753</sup> The ECtHR encouraged Italy to assess the appropriate measures for reducing the number of confined people inside Italian penal establishments, and ensuring adequate living conditions.<sup>754</sup>

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<sup>749</sup> *Torreggiani*, n.736, par. 79, 96. The Court first analysed the national law on prison, particularly focusing on Art. 6 Penitentiary Law of 1975, which describes the minimum requirements that must be respected for cells and spaces where prisoners live to respect their human dignity. Art. 6 states that cells shall be sufficiently spacious, enlightened by natural and artificial light in a way to allow work and reading; they shall be ventilated, heated where climate conditions so require, and furnished with private sanitations, which shall be decent and rational. Cells shall be preserved in good conditions and cleaned. Cells consist of rooms providing one or more placements. Furthermore, the Grand Chamber considered the complaint procedure under Art. 35 Penitentiary Law that can be initiated by prisoners who believe that their rights have been violated. The Court acknowledged that progress in cases concerning detention conditions remained sporadic, while the measures undertaken with the 2010 Prison Plan did not give rise to satisfactory improvements in relation to prison overcrowding. *Torreggiani*, par. 23-28. For further reflections on this judgment, see also Francesco Viganò, 'Sentenza pilota della Corte EDU sul sovraffollamento delle carceri italiane: il nostro Paese chiamato all'adozione di rimedi strutturali entro il termine di un anno', *Diritto Penale Contemporaneo*, 9 January 2013. As a commentary to the judgment, see also Gabriele Della Morte, 'La situazione carceraria italiana viola strutturalmente gli standard sui diritti umani (a margine della sentenza *Torreggiani c. Italia*)' (2013), *Dir. umani e dir. internaz.* 1, 147 following; Massimiliano Dova, '*Torreggiani c. Italia*, un barlume di speranza nella cronaca del sistema sanzionatorio' (2013), *Riv. it. dir. proc. pen.*, 948 following; Giovanni Tamburino, 'La sentenza *Torreggiani* e altri della Corte di Strasburgo' (2013), *Cass. pen.* 2013, 11 and following.

<sup>750</sup> *Torreggiani v Italy*, n.736, par. 30. The characteristics of Italian prisons denounced by the Court recall a contemporary adaptation of the panopticon model, based on more separation, less vital space among inmates. See Foucault, n.5; Ristorph, n.185.

<sup>751</sup> Della Bella, n.745. The Court observed that the mechanisms in place to protect prisoners' rights in Italy were not adequate, mainly because the possibility of compensation for violations of Art. 3 of the Convention does not have a preventive effect in stopping these violations from taking place. *Torreggiani*, n.736, par. 96-99.

<sup>752</sup> *Ibid.*, par. 48 – 50.

<sup>753</sup> *Ibid.*, par. 87-89.

<sup>754</sup> Ruotolo, n.727; Giostra, n.745; Marco Mariotti, 'Ancora sul sovraffollamento carcerario: nel calcolo della superficie della cella è compreso lo spazio del letto? La Cassazione interpreta la giurisprudenza di Strasburgo in modo particolarmente favorevole ai detenuti' (2017), 3 *Diritto Penale Contemporaneo*, 311-318; Patrizio Gonnella, 'Il lungo cammino dell'attesa riforma', *Il Manifesto*, 24 December 2017. Gonnella is the Director of Associazione Antigone, an Italian NGO that monitors conditions of imprisonment inside Italian penal estates.

### 5.3.2 “Post Torreggiani”: the impact of the ECtHR case law on the prison reform process in Italy

*Sulejmanovic*, and most importantly the *Torreggiani* rulings, gave new impulse to the attempts to reform Italian prison and sentencing legislation and policies.

The most relevant – and perhaps unexpected – consequence of the *Torreggiani* judgment proved to be the attempt to adopt new policies aimed at re-considering the problems linked with the carceral space in a long-term perspective. The new strategy was based on the valorisation of the notions of human dignity and re-education, which were already established in the 1974 Prison law, but had never been really enforced.<sup>755</sup>

In 2013, the then Ministry of Justice decided to appoint a Commission headed by Prof Mario Palma<sup>756</sup> with the aim of reviewing the conditions of imprisonment inside Italian prisons, as well as elaborating proposals for reform.<sup>757</sup> In 2015, the Ministry of Justice raised the stakes of the reform process by establishing an Expert Committee, headed by Prof Glauco Giostra, with the aim of organising a general public consultation on the enforcement of punishments (*Stati Generali sulla esecuzione penale*).<sup>758</sup> The Committee was appointed with the task of proposing topics of discussion to be examined by several working groups coordinated by the Committee, whose findings were summarised in a final document.<sup>759</sup>

Among the emergency measures, in 2013 the Italian Government established the Ombudsman for the protection of rights of persons deprived of their liberty.<sup>760</sup>

The Ombudsman has various competences. Like its English equivalent, it monitors places of deprivation of liberty, signalling their criticalities and finding solutions to solve them in cooperation with the authorities. He can also receive and assess prisoners’ complaints when they do not require the judicial intervention of the supervisory magistrate who deals with complaints lodged against the prison administration.<sup>761</sup> The Ombudsman also acts as the National Independent Monitoring Mechanism under the UN Convention Against

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<sup>755</sup> See Angela Della Bella, ‘Il carcere oggi: tra diritti negati e promesse di rieducazione’ (2017), 4 *Diritto Penale Contemporaneo*, 42 – 50. See Commissione per la Riforma dell’Ordinamento Penitenziario, *Proposta di riforma dell’ordinamento penitenziario*, *Diritto Penale Contemporaneo*, 9 February 2018 [<https://www.penalecontemporaneo.it/d/5850-riforma-dell-ordinamento-penitenziario-la-proposta-della-commissione-giostra-lo-schema-del-decreto>].

<sup>756</sup> Prof. Palma has been President of the European Committee for the Prevention of Torture and other inhuman or degrading treatment at the Council of Europe and he is currently the Italian Ombudsman for prisoners’ rights.

<sup>757</sup> Ministry of Justice, Decree 13 June 2013 (*Costituzione commissione di studio in tema di interventi in materia penitenziaria*).

<sup>758</sup> Ministry of Justice, Decree 8 May 2015 (*Costituzione Comitato di esperti per lo svolgimento della consultazione pubblica sulla esecuzione della pena denominata "Stati Generali sulla esecuzione penale"*).

<sup>759</sup> *Ibid.*

<sup>760</sup> Law Decree 23 December 2013 n. 146 (Official Gazette n.300, 23 December 2013), Art. 7. The operating Committee and Office members were wholly appointed only in early 2016. See Garante nazionale dei diritti delle persone detenute o private della libertà personale, at [<http://www.garantenazionaleprivatiliberta.it/gnpl/it/chisiamo.page>], accessed 7 June 2019.

<sup>761</sup> Law Decree 146/2013, Art. 3.

Torture.<sup>762</sup>

As a result of these activities, the Ombudsman issues specific reports after each visit to places of detention, and reports annually to the Italian Parliament.

The Ombudsman has been fundamental in raising concerns about the conditions of LGBTQ prisoners in Italian penal estates, which were made the object of specific official recommendations and for the first time of a more comprehensive analysis from a State-appointed body, whereas the work of the English counterpart was included within a more concerted institutional effort.

### 5.3.3 The approved reform: a departure from the recommendations issued by the *Giostra* Committee

The legislative decrees enacting the reform reduced the scope of the initial proposals of the *Giostra* Committee.<sup>763</sup> The provisions will be analysed in detail in the following chapter. It is however interesting to consider the normative foundations of the original proposal to better understand the rationale underpinning the adopted decrees.

The *Stati Generali* were a noteworthy experiment in the way they embraced intersectionality and they integrated the legal reform with cultural and scientific considerations.<sup>764</sup> While the working groups reflected on several issues affecting the prison system, the reform process proceeded in Parliament through the discussion of the reform bill.<sup>765</sup>

The Parliamentary mandate aimed to focus on guiding principles based on Art. 27 (3) of the Italian Constitution, namely the re-educational aim of imprisonment, and the necessity of delivering a punishment that respects the humanity of the convicted individual,<sup>766</sup> which were clearly informed by the ECtHR *Torreggiani* judgment.<sup>767</sup> Nevertheless, the unpopularity of the concept of “humane imprisonment”<sup>768</sup> caused the law approved by the Parliament to present a clash between divergent philosophies of punishment. On one side, the law aimed at reforming not only the prison system, but also relevant areas of criminal law and of the law on criminal procedure, particularly introducing alternative punishments to imprisonment, and substituting

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<sup>762</sup> Garante nazionale dei diritti delle persone detenute o private della libertà personale, at [<http://www.garantenazionaleprivatiliberta.it/gnpl/it/chiamo.page>], accessed 7 June 2019.

<sup>763</sup> Legislative decrees 121, 123 and 124/2018, n.725. The work of the *Giostra* Committee was only partially integrated in the Parliamentary law delegating the Government to enforce the reform. The accepted principles for reform have been detailed within law 23 June 2017 n. 103 (Official Gazette n. 154, 4 July 2017 - “Orlando reform”), par. 85(a), (b), (c), (e), (h), (r) and (t).

<sup>764</sup> *Giostra*, n.745.

<sup>765</sup> Italian Parliament, Camera dei Deputati, Delega al Governo per la riforma del processo penale e dell’ordinamento penitenziario (House of Commons, Delegation to the Government to reform criminal trial and the prison system), at [[https://www.camera.it/leg17/561?appro=il\\_quarto\\_anno\\_della\\_legislatura](https://www.camera.it/leg17/561?appro=il_quarto_anno_della_legislatura)], accessed 23 December 2019.

<sup>766</sup> Fabio Fiorentin, ‘La conclusione degli “Stati Generali” per la riforma dell’esecuzione penale in Italia’, *Diritto Penale Contemporaneo*, 6 June 2016, at [<https://www.penalecontemporaneo.it/d/4800-la-conclusione-degli-stati-general-per-la-riforma-dell-esecuzione-penale-in-italia>], accessed 23 December 2019.

<sup>767</sup> *Ibid.*

<sup>768</sup> *Giostra*, n.745.

imprisonment with other types of sanctions.<sup>769</sup> It aimed to focus on strategies to avoid using imprisonment as punishment, at the same time opening up prisons through measures providing alternatives to prison life, as well as highlighting restorative justice strategies.

However, as noticed by Palazzo, the reform did not succeed in limiting the use of prison sentencing, since the same law provided for the tightening of punishments for certain crimes considered more serious or socially alarming. This ended up sending two contradictory messages in terms of general criminal justice policy.<sup>770</sup>

Additionally, the law did not fully reflect the complexity of the outcomes of the *Stati Generali*, considering that many proposals and reflections resulting from that experience have been dropped, for example all recommendations on prisoners' relationships and expressions of affection.<sup>771</sup>

Ultimately, the overarching principles underpinning the work of the Commission went back to the constitutional principle of rehabilitation as the main aim of imprisonment, with focus on prisoners' re-socialisation and on the individualisation of treatment.<sup>772</sup> To achieve these goals, the reform sought to reconsider the way prison life is organised by leaving aside the principle of "authority" that has regulated the relationship between the Prison Administration and confined individuals. This translated into avoiding absolute legal presumptions based on the belief that a prisoner cannot be re-socialised, instead taking into account the psychological situation and the progress made by the individual prisoner.<sup>773</sup>

Unfortunately, the decrees enforcing the reform ended up relying once more on imprisonment as the main punishment without adequately tackling the normative carceral foundations.<sup>774</sup> Particularly, the parts of the proposed reform dealing with alternatives to imprisonment, relationships and improvements on psychiatric assistance for people deprived of their liberty did not pass the final stage before enactment. The data analysis

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<sup>769</sup> Law 103 / 2017, par. 85 (a), (b), (c), (e), (h), (r), (t). Guiding principles included the review of conditions and procedures to access alternative measures to imprisonment, and of the impediments to access privileges during imprisonment; the introduction of restorative justice activities; the increase of opportunities to access paid work inside and outside prison, and of volunteering activities; the enactment of measures to protect women prisoners, including women in prison who are mothers.

<sup>770</sup> Francesco Palazzo, 'Crisi del Carcere e Interventi di Riforma: Un Dialogo Con la Storia' (2017), 4 *Diritto Penale Contemporaneo*, 8-9.

<sup>771</sup> Garante Nazionale dei diritti delle persone detenute o private della libertà personale, *Relazione al Parlamento 2019*, (Ombudsman for the rights of persons detained or deprived of their liberty, Report to Parliament 2019), at [<http://www.garantenazionaleprivatiliberta.it/gnpl/resources/cms/documents/00059ffe970d21856c9d52871fb31fe7.pdf>], accessed 9 June 2019, 35-38; Susanna Marietti, 'Aspettando (invano?) la riforma', in *Associazione Antigone, Un anno in carcere – xiv rapporto sulle condizioni di detenzione a cura di associazione antigone*, [<http://www.antigone.it/quattordicesimo-rapporto-sulle-condizioni-di-detenzione/>], accessed 9 June 2019.

<sup>772</sup> Commissione per la Riforma dell'Ordinamento Penitenziario nel suo Complesso, *Proposta di Riforma dell'Ordinamento Penitenziario* (Committee for the Reform of Prison System as a whole, presided by Glauco Giostra), Ministerial Decree 19 July 2017 (*Commissione Giostra*), at [<https://www.penalecontemporaneo.it/upload/6045-propostariformaopcommgiostra.pdf>], accessed 23 December 2019, Introduction.

<sup>773</sup> Commissione Giostra, *ibid*, at p. 5-6; sent. Constitutional Court, sent. 26 May 2010, n. 189; sent. Const. Court, sent. 279/2013, n.731.

<sup>774</sup> *Commissione Giostra*, n.773. On criticisms to the final version of the reform, see Angela Della Bella, 'Riforma dell'Ordinamento Penitenziario: Le Novità in materia di Assistenza Sanitaria, Vita Detentiva e Lavoro Penitenziario', *Diritto Penale Contemporaneo*, 7 novembre 2018, at [<https://www.penalecontemporaneo.it/d/6317-riforma-dell-ordinamento-penitenziario-le-novita-in-materia-di-assistenza-sanitaria-vita-detentiva>], last accessed 23 December 2019; Emilio Dolcini, 'Carcere, Problemi Vecchi e Nuovi', *Diritto Penale Contemporaneo*, 19 novembre 2018, at [<https://www.penalecontemporaneo.it/d/6332-carcere-problemi-vecchi-e-nuovi>], accessed 23 December 2019.

will show that this outcome overlooks negative experiences of the general prison population, and particularly of LGBTQ prisoners.

#### 5.4 Comparing the English and Italian conceptualisation of imprisonment

The English prison legal framework is grounded on a problematic opacity in relation to the definition of the aims of imprisonment. Although English case law has developed a distinction between prisoners' personal and residual liberty, somehow acknowledging the existence of positive rights that the State must protect and limit only to the extent it is necessary and proportionate, the content of limited liberties remain often undefined, due to the absence of a clear constitutional or statutory principle.

On the contrary, the Italian legal framework, based on the civil law tradition, attributes great importance to establishing fundamental norms in a written source hierarchically superior to the other legislative or administrative acts. The Italian Constitution, and the interpretation of the fundamental principles provided by the Constitutional Court, clarifies that the principle of human dignity and respect for human rights apply both in adopting provisions depriving individuals of their liberty and in enforcing the punishment of imprisonment.

The Italian constitutional culture, and the reliance on the principle of rehabilitation and human dignity, depends also on historical reasons: the Constitution was adopted after the end of the World War II and the years of a fascist regime. The drafters of the Constitution felt it essential to depart from that experience, and the re-definition of the CJS represented an essential area of law in need of reform at its very roots.

However, the explicit enunciation of principles that should inform the prison system did not necessarily translate to better prison conditions in Italy than in England. Indeed, such principles have not been substantially enforced, partly for lack of resources, but principally due to the continuing reliance on retribution from other actors of the CJS, such as policy makers and enforcement officials.

In this regard, international human rights law, particularly within the ECHR framework, had profound impact on both systems in different ways, due to the way they internalise Convention principles within their domestic framework. The adoption of the HRA in England has favoured the integration of Convention standards mainly via Courts' interpretation, yet it preserved the parliamentary prerogative. Judges are often reluctant to create direct change within the prison system, thus the legal framework carefully reiterates the political control of the Secretary of State and other monitoring bodies.<sup>775</sup> In Italy, ECtHR judgments such as *Torreghiani* contributed significantly to set in motion a political process aimed at tackling dramatic injustices afflicting Italian inmates, starting from prison overcrowding. However, guidelines based on Convention rights do not dictate explicitly how the scope of imprisonment should translate into administrative regulations that comply with human rights, leaving this assessment to State policies. Cultural traditions informing the founding paradigm of the CJS in

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<sup>775</sup> Lazarus, n.164, at 766 -777.

retributive terms to satisfy a hostile public opinion towards prisons prevent real integration of human rights standards in prison policies.

In this context, the regulation of sexuality and gender identities remain at the margins. Because of the vagueness that often afflicts the human rights system when addressing these issues, the lives of LGBTQ people struggle to be acknowledged, or integrated, within a carceral system that by its very nature tends to erase what it perceives as deviance from the surveillance and control norm.

Nevertheless, the more developed analysis of the relationship between human rights and risk management typical of the English system, along with more consistent progress regarding LGBTQ rights, has resulted in an increased attention to these categories in the relevant prison context. The HRA and the EA contributed to oblige prison authorities considering SOGI as protected characteristics even during imprisonment, and to attempt implementing policies respecting this legal framework.

On the contrary, Italy lacks non-discrimination legislation expressly including SOGI as protected grounds in every aspect of private and public life, and in every interaction between individuals and public authorities. Therefore, in spite of the presence of strong constitutional principles, and of recently reformed prison legislation affirming the principle of non-discrimination also in relation to SOGI, generic statutory provisions failed to translate to coherent, overarching policies addressing the lives and problems of LGBTQ people during the whole imprisonment cycle, as they are not supported by an elaboration of the positive rights the State should be committed to protect.



## Chapter 6

### Fieldwork findings

#### 6.1 Introduction: Identifying a plurality of identities in the prison system

This chapter will discuss the main themes emerging from the analysis of the interviews conducted in English and Italian prisons over the period July 2018 - February 2019. One main topic of discussion concerned the way participants decided to represent their identities in terms of sexualities and gender expressions. I will make the case that the prison system struggles to capture the wide spectrum of identities populating the penal estate. Laws and policies have attempted – both in England and in Italy – to finally acknowledge the existence of LGBTQ inmates, yet frames them within an essentialist and heteronormative perspective.

Significantly, some participants have elaborated their identity in a way to assimilate such framework, for instance by opposing their “respectful” – accepted by the prison staff – homosexuality against those of “fairies” (*checche*), i.e. more feminine looking inmates who would disrupt the order of prison life with their behaviour and mannerisms. Similarly, transgender participants commented on the provocative attire of some transgender prisoners, implying that it would legitimise prison staff or other prisoners’ violent or offensive reactions. Sexuality and gender are embedded in an exclusionary scheme of identities or practices that do not conform to the normative power affecting both prisoners and staff.<sup>776</sup>

The legal representation of sexualities and identities and the way they are performed in daily prison life present significant moments of convergence and dichotomy that have affected key aspects of participants’ lives. Strategies adopted by the prison system to recognise inmates’ gender and sexuality influence decisions about their location within the penal estate and their access to rehabilitation programmes and prison services, particularly regarding health care assistance. It affects their interactions with other prisoners, staff, and people outside prison coming to visit them.

The interviewees discussed at length the intimate connotations of these relationships. I will argue that the current legal framework makes these connections invisible. Negating the relational dimension of identity, and core social dynamics among prisoners<sup>777</sup> de-humanises prison residents and perpetuates a transphobic, queerphobic normativity.

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<sup>776</sup> Queer criminologists have critically investigated systemic strategies of marginalisation of queer minorities dealing with the CJS: see e.g. Knight and Wilson, n.133; Ball, n.48; Dalton, n.11; Blair Woods, n.11; Buist and Lenning, n.11. Concerning the manifestations of disciplinary power in prison, see Foucault, n.5. On the analysis of hierarchy among prisoners and the development of a specific terminology, see Chapter 2, par. 2.9.

<sup>777</sup> Hochdorn and Cottone, n.36.

### 6.1.1 Self-identification v prison classification at admission

My participants presented a variety of sexual orientations and gender identities. Their narratives can be grouped into overarching conceptualisations of sexuality in terms of sexual identity, sexual behaviour or sexual desire.<sup>778</sup>

The tables below gives an overview of how they self-identified:

<b>Sexual Orientation</b>	<b>England</b>	<b>Italy</b>	<b>Total</b>
Heterosexual/straight	1	3	4
Homosexual/gay	3	2	5
Attracted to women (but not lesbian)	1	–	1
Lesbian	1	2	3
Bisexual	–	4	4
Initially bisexual, but I think assigning labels is wrong	–	1	1
I don't label myself	1	–	1
Did not answer	1	1	2
			21

*Table 1: How participants identified their sexual orientation*

<sup>778</sup> See Parks and others, n.333.

Gender Identity	England	Italy	Total
Female	2	5	7
Transgender male	1	1 (and androgynous)	2
Transgender female	2	—	2
Transsexual male	—	—	—
Transsexual female	—	3	3
Transsexual female, but I do not like the term	—	1	1
Crossdresser	—	1	1
Did not answer	—	5	5
			21

Table 2: How participants identified their gender identity

Participants were given a questionnaire with a number of options to define their sexual orientation or gender identity.<sup>779</sup> However, the tables show how participants “queered” these classifications, using their own terminology and adding more nuance and complexity to pre-assigned labels.<sup>780</sup> The tables present both prisoners’ adherence to coherent sexualities and identities, and resistance.<sup>781</sup> They tended to define their sexual identity by adopting categories that can be referred to as the LGBT umbrella. Cisgender men easily used the term “homosexual” or “gay”,<sup>782</sup> while cisgender women interviewees identified as “lesbian” or “bisexual”. Nevertheless, they sometimes manifested more nuanced definitions than the ones presented to them in the forms provided by prison staff (in England). Furthermore, labels could entail different meanings depending on their point of view, social and national background, or their experience in prison.

<sup>779</sup> The questionnaire reflected and expanded upon the categories among which prisoners (in England) can choose when entering prison.

<sup>780</sup> For instance, some interviewees hinted at how their sexual orientation has changed through time. Others went back to their life in their countries of origin, or at the time of their coming out to explain the various implications of identifying their sexual orientation and gender identity, thus showing the intersectionality and historic implications of self-identifying in one way or another. Participants did not generally have any difficulties in reporting their sexual orientation during the interview. However, it must be considered that all the interviewees were “out,” and the prison staff and other prisoners were aware of their sexual preferences.

<sup>781</sup> On the relationship between legal normativity and resistance, see e.g. Stychin, n.89; Stychin, n.61. On the specific notion of resistance introduced by Foucault, see n.20; Taylor, n.37.

<sup>782</sup> When I interviewed William, he reflected on the fact that he would use the word “homosexual” in more formal circumstances: “I would use homosexual now and again, like, in professional things. If I was talking about my sexuality to just like friends, family, that kind of things, I would use the word gay”. Interview with William, prisoner at UK-1 (28 November 2018).

The normalised categories of language can become a burden. Vera, for example, refused to characterise her current identity as “lesbian” because of her relationship with another same-sex inmate, since she said she does not need “the comfort”, but she has to “gel with the person, and if it happens, it happens”. Ultimately, she falls in love “for the person, not the gender. So I would say I probably like anything: transsexual people, I like men I like women both, I like the person”.<sup>783</sup> Elena, a transgender woman at ITA-1, aligned with this view when she stipulated that definitions are limiting and exclusionary, and tend to create categories that must be conventionally defined, whereas sexuality is “something” that she “decides day by day”.<sup>784</sup>

Homosexuality was usually described by participants in behavioural terms, as an attraction towards people of the same sex.<sup>785</sup> Some alluded to the fact that homosexual identity should be immutable: “If you like men and women, go for it!” Roman told me. “It is your choice, do what you want. But the way I see it, I see that this ambiguity, it does not make feel them good.”<sup>786</sup>

However, lesbian interviewees talked about the deprivations of imprisonment for married heterosexual women who could not have a daily interaction with their children or partners anymore. For them, prison could become a place for new experiences with inmates of the same sex, which my participants often framed as a quest for affection that goes beyond the purely sexual sphere.<sup>787</sup>

Some interviewees considered this newly found orientation towards people of the same sex as an opening to new possibilities that may have more long-term implications: “it is as if someone closes the door of your liberty, but in exchange, a door with a lot of things that you would have never see outside opens. And one of those things is the sexuality between two women.”<sup>788</sup>

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<sup>783</sup> Interview with Vera, prisoner at UK-2 (27 February 2019).

<sup>784</sup> Interview with Elena, prisoner at ITA-3 (23 August 2018): *Limitano ed escludono [le definizioni] e comunque tendono a creare per forza delle categorie che devono essere standard e ben definite [...] non mi fermo a dire questa persona eterosessuale è appunto solo una categoria io penso comunque che la mia sessualità è una cosa che decido giorno dopo giorno* (“[definitions] are limiting and exclusionary, and they tend to create categories that must necessarily be standardised and well-defined [...] I don’t limit myself saying this person is heterosexual, heterosexuality is indeed only a category, I think that my sexuality is something I decide day by day”). This reasoning reflects the challenge to define gender and sexuality at the international level (see e.g. Otto, n.104; Saiz, n.144), and more generally in the legal discourse. On the non-neutrality and regulatory function of legal terminology, see among others Butler, n.80.

<sup>785</sup> Interview with Riccardo, prisoner at ITA-4 (22 August 2018): “I understood that my orientation was towards the men and not towards women anymore” (*ho capito che la mia tendenza era verso l’uomo e non più verso la donna*).

<sup>786</sup> Interview with Roman, prisoner at ITA-4 (22 August 2018): *a me piace l’uomo e la donna, vai allora! è una tua scelta, fai quello che vuoi. Ma non ti fa star bene, perché poi vedo, questa ambiguità, non li fa star bene*. This type of reflection echoes the society’s tendency to think through binary categories. Participants seemed here to have internalised a narrative built upon the rejection of “deviant” sexualities, which in this case were represented by a certain scepticism towards bisexuality. Such behavioural description of homosexuality did not seem to acknowledge the various functions of sexuality included in Eve Sedgwick’s notion of “homosocial.” Sedgwick, n.20.

<sup>787</sup> Interview with Vera, prisoner at UK-2 (27 February 2019): “They need the comfort, they have never been with a woman before and the life they would make out here, but when they go out they wouldn’t still be with a woman, it’s just in here”. This different approach to same-sex sexuality than cisgender men seems to confirm the literature’s stance that women experience the pains of imprisonment more negatively due to their role as carers within the family (Codd and Scott, n.237).

<sup>788</sup> Interview with Concita, prisoner at ITA-5 (28 August 2018): *è come se uno chiude la porta della tua libertà, però in cambio, a mio parere, si apre una porta per un sacco di cose che fuori non avresti mai guardato. E una di queste è la sessualità tra due donne*. Concita proves here the arguments elaborated by Ahmed on the relationship between sexuality, orientation and the space in *Queer Phenomenology* (2006).

In the male setting, prisoners who do not assert their sexual orientation in definitive terms or seem to oscillate between the attraction for people of various genders were often portrayed with a negative connotation, as people who want to hide their preferences to not stand out, or as individuals who are not “truly gay”.<sup>789</sup> On the contrary, female participants were less critical towards women who experiment with their sexuality, perhaps also because this phenomenon seems more common than in male penal estates: “When you enter a context like this, you do not even notice who is lesbian, who is gay...you really do not notice it.”<sup>790</sup>

Fascinatingly, Alessia drew quite a strong conclusion when she stated: “the woman is fundamentally lesbian, and prison is the blatant demonstration of this...that my theory is correct.”<sup>791</sup> This theory seems to question the widespread societal and legal notion of woman as an archetype for heterosexuality. This subversive opinion channels Monique Wittig’s material theory of universalisation of the minority subject, in particular the lesbian subject. Wittig’s claim that lesbians are not women<sup>792</sup> may sound as the exact opposite to what Alessia believes; however, Wittig does not mean to oppose the minority point of view to the conventionally accepted universal one, otherwise this would turn the minority into a new essentialist majority. Contrariwise, Wittig’s aim is to de-sexualise language, to contest the categories of man and woman and open new possibilities in the representation of sexual orientations and identities.<sup>793</sup>

Other participants were less radical in their accounts, even if entrenched in dynamics of desire. They linked the attraction for same-sex prisoners with the lack of emotional strength to cope with the prison environment, the deprivation of children and friends’ affection, but also partners, which is why they became more receptive to people of the same sex who manifest interest in them.<sup>794</sup>

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<sup>789</sup> Interview with Roman, prisoner at ITA-4 (22 August 2018): “perhaps it is convenient, I don’t know, if at the Ministry or whoever else decides these things, to move some people and place them in a gay section or not, but if someone is gay, he is gay from the beginning, you do not become gay after a while you are in prison”. (*Forse fa comodo, non lo so, se al ministero o chi, decide queste cose qua, per spostare delle persone e metterle in una sezione gay o meno, però se uno è gay è gay dall’inizio, non diventi gay dopo un po’ di tempo che stai in carcere*). This narrative mirrors the criminological literature on situational homosexuality (Hensley, n.198) which has been criticised as too simplistic by queer theorists (Kunzel, n.194).

<sup>790</sup> Interview with Alessia, prisoner at ITA-5 (28 August 2018): *secondo me su queste cose arrivi in un contesto che non ci fai neanche caso a chi è lesbica, chi è gay..non ci fai proprio caso*. This kind of statement from participants confirms the development in the qualification of personal relationships in women’s prison. In a similar vein, see Greer, n.250.

<sup>791</sup> Interview with Alessia, prisoner at ITA-5 (28 August 2018): *la donna fondamentalmente è lesbica. Perché è così, è così. E il carcere è la dimostrazione lampante...che quello che dico, che la mia teoria è giusta*.

<sup>792</sup> Wittig, n.39.

<sup>793</sup> As Butler reminds us, Wittig’s work on language is meant to impact on reality, too, since Wittig is a materialist reminiscent of Marx’ theories. Judith Butler, ‘Wittig’s Material Practice: Universalizing a Minority Point of View’ (2007), 13 *A Journal of Lesbian and Gay Studies* 2, 519-533, at 520-521. Hale reports some insightful words from Wittig on how women become real only in the eye of the heterosexual man, generally through marriage, which is particularly revelatory within the prison framework, where women explore new orientations of their bodies and desires in the absence of the power structure they were used to outside: “Insofar as the virtuality ‘woman’ becomes reality for an individual only in relation to an individual of the opposing class and particularly through marriage, lesbians, because they do not enter this category, are not ‘women’. Besides, it is not as ‘women’ that lesbians are oppressed, but rather in that they are not ‘women’. See Jacob Hale, ‘Are Lesbians Women?’ (1996), 11 *Hypathia* 2, 94-121, at 97.

<sup>794</sup> Interview with Fiona, prisoner at ITA-5 (27 August 2018): ‘Some people develop a form of attachment, in the sense that they miss a beloved one, they miss their children, they miss their people, they miss their friends, so when they see a person who is interested in them, they start questioning themselves’ (*ci sono persone che si fanno coinvolgere, nel senso che gli manca un affetto gli mancano i figli, gli mancano le persone care gli mancano le amicizie, quindi quando vedono comunque una persona che è interessata a loro, si fanno due domande*).

This narrative shows an overlapping of the representation of sexual orientation as behaviour (prisoners entertain same-sexual acts, yet they are not homosexual) and sexual orientation as desire (inmates may or may not have sex, but if it happens, it goes beyond physicality in the aim of reaching some peace of mind in an unwelcoming environment). Although less evidently than in Alessia's account, one can still detect the echo of Wittig's rationale behind this storytelling. A change in material conditions, due to the absence of members of the other sex, led to a reconfiguration of reality and language that universalises the minority: "let's say that among ten people who said 'I would never have sex with a woman because I do not like it', two of them remain coherent with what they say."<sup>795</sup> It also beautifully represents the complex (social) functions attached to homoerotic desire as analysed by Sedgwick.<sup>796</sup>

Categories can however be internalised – and essentialised – also by members of a prison minority group. In each visited penal estate, I came across narratives of "true" homosexuality versus a "temporary" one. According to some participants, belonging to one sub-group or the other had social consequences within the prison environment. Simon distinguished between homosexual prisoners who are out and ended up being separated from the general prison population, and those whom he called "jail gay", who remain in the main wing and do not identify as gay, but have sex with other men for reasons that are not necessarily linked with desire: "look I'm bored, I need to do something, it's something I'll have a crack on with it, I think it's something more that you get in the main side, rather than someone who is openly gay."<sup>797</sup> On the other hand, even if they were, they could not disclose it in the main wing, as prisoners are "beasts" there, to use Simon's words.<sup>798</sup>

A similar distinction emerges also with participants living in female prisons. Someone who is "truly gay" would not flirt or wink or engage in overt effusions in the prison corridors as people who "become lesbian in prison do", as the former are "very private."<sup>799</sup> Participants hosted in male prisons talked further about "curious gay" prisoners, who appeared to be similar to "jail gay". They stay together with the general population, presenting themselves as heterosexual, but they then flirt with homosexual prisoners located in special sections.

Interestingly, interviewees called homosexual people flirting with heterosexual prisoners "fairies". They were described as more feminine individuals, who "use their homosexuality" as a masque to act in an overtly feminine manner. Homosexual male participants at UK-1 highlighted that "there are certain people who are on the wing who you can tell they are gay by looking at them, the way they act, their mannerism, all that kind of thing".<sup>800</sup> In particular, Simon used this example to explain he was instead a "stereotypical straight that

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<sup>795</sup> Interview with Alessia, prisoner at ITA-5 (28 August 2018): 'Out of 10 people who say that they would never do anything with a woman because I like...2 of them remain consistent' (*Perché su 10 persone che dicono io con una donna non ci andrei mai perché mi piace...sono 2 quelle che rimangono coerenti*).

<sup>796</sup> Sedgwick, n.20.

<sup>797</sup> Interview with Simon, prisoner at UK-1 (28 November 2018).

<sup>798</sup> Simon clearly refers here to a homotransphobic environment, echoing Dunn's theory of the cycle of discrimination and invisibility affecting prisons (n.133), as well as queer criminologists such as Ball (2014), n.48.

<sup>799</sup> Interview with Cynthia, prisoner at UK-2 (27 February 2019).

<sup>800</sup> Interview with Simon, prisoner at UK-1 (28 November 2018).

happen to be attracted by men”, based on such factors as him liking sports like rugby or football.

These accounts let emerge a conflation between sexual orientation and gender roles based on masculine assumptions. Homosexual persons have to maintain coherency in their attraction. Sexual orientation should be a fixed characteristic to be authentic. Furthermore, the homosexual subject can express their sexuality only in private. Behaving differently damages “respectable” homosexual people’s reputation or is a sign that someone is not a “real” gay or lesbian, but only seeks to exploit the single-sex environment.<sup>801</sup>

Identity categories are loaded with social assumptions. In male settings, the homosexual subject must remain “a man” if you “want to build a family together with him”,<sup>802</sup> while the “fairy” is too provocative in his pose and gestures, or too feminine. Their passions are associated with female traits as a sign of weakness. The homosexual male subject elicits class expectations, at least in the Italian context. Roman said that he is perceived as wealthy, while Silvia described her gay friends outside prison as Italian, well-educated workers.<sup>803</sup> In England, at least one participant connoted her sexual orientation with political implications, asserting that her sexual orientation stopped at her sexual preferences and did not mean that she participated in marches or Pride parades. Interestingly, Cynthia also explained that this representation of homosexuality depends on her older age, as it was not a common thing to do when she lived outside prison several years ago.<sup>804</sup>

At ITA-5 prison, a distinction was made between women who appeared more masculine and those who were more feminine and tried to attract the former’s attention.<sup>805</sup> I could see that some participants all looked quite similar (short hair razored on the sides, and white t-shirts) and were deemed “masculine”. Particularly, short hair seemed to signal to other women that they could flirt with them.<sup>806</sup>

This form of internal coding appears to replicate male-female relationship stereotypes (e.g. where the “masculine” woman plays an active role in the couple’s sexual life), but could also be interpreted as an example of alternative masculinities without men, to use Judith Halberstam’s words.<sup>807</sup> Often neglected by structures of power and domination, the absence of the male subject in female prisons allows different gender expressions to flourish.

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<sup>801</sup> See e.g. Valdes, n.32, on the conflation between sex, gender and sexual orientation. The prison dynamics based on respectability which affect more severely LGBTQ people, and the role of the State in consolidating them, including through law, are explored – among others – by Lamble, n.34. The acceptability of same-sex sexuality only in private has also been perpetuated by international human rights law when advocating for decriminalisation of same-sex sexual acts, as examined in Chapter 4.

<sup>802</sup> Interview with Sara, prisoner at ITA-4 (22 August 2018), who identifies as a crossdresser homosexual (*un uomo con cui avere una famiglia insieme [...] deve fare l'uomo*).

<sup>803</sup> Interview with Silvia, prisoner at ITA-3 (7 August 2018): ‘most of my friends are Italian people, well-educated, who normally work and study’ (*la maggior parte delle mie amicizie sono persone italiane, educate, che studiano che lavorano normalmente*).

<sup>804</sup> Interview with Cynthia, prisoner at UK-2 (27 February 2019).

<sup>805</sup> Interview with Gloria, prisoner at ITA-5 (28 August 2018).

<sup>806</sup> This dynamic reminded me of the distinction between “butch” and “femme” noticed by Kunselman and others, n.207, though I found this binary divide only at ITA-5 and not, for instance, at UK-2.

<sup>807</sup> Halberstam, n.56. Eve Sedgwick also suggests that masculinity may have anything to do with being men in *Epistemology of the Closet*.

Hence, sexual categories are not neutral: language can imply a plurality of meanings that are sometimes explicit but are more often not immediately clear..

The prison system exacerbates interpretation of identities based on homophobic and transphobic fixity and does not enhance different sexualities to develop freely.

In this sense, collecting accurate data on the LGBTQ prison population is crucial.

### 6.1.2 Data collection on sexual orientation and gender identity: classifying in accordance with the heteronormative paradigm

The HMPPS confirms that data about the prison population in the area of SOGI are self-reported and underreported.<sup>808</sup> A similar problem affects also data regarding the LGBTQ prison population in Italy.<sup>809</sup>

Attempts have been made in recent years to fill this gap. Without accurate quantitative and qualitative data on these minority groups, not only do they remain invisible,<sup>810</sup> but the Prison Service cannot allocate appropriate resources and services to face their specific needs through rehabilitation programmes.

Lack of data depends on a number of factors. First, prisoners may be afraid of disclosing sensitive information to prison staff for fear of being harassed or bullied by them or other prisoners.<sup>811</sup> As William put it:

*You may have heard of certain gay people who don't want to identify as gay while being in prison, possibly because of the stigma that would be attached to it, or the chances of getting into any trouble while being in prison, cos at the end of the day prisons are, they are known to be a very macho environment.*<sup>812</sup>

Entering a completely new environment with unknown rules and connoted by hypermasculine dynamics makes it hard for prisoners to entrust the staff with intimate details about themselves. The admission process represents a crucial moment of re-orientation of the body<sup>813</sup> which can have profound consequences on the subsequent stages of the prison sentence.

Even when a person would be willing to disclose their SOGI, the prison staff may not always be properly trained or display discriminatory attitudes, consequently leading the prisoner to remain silent, or pretending to be a cisgender heterosexual individual:

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<sup>808</sup> HMPPS, Offender Equalities Annual Report 2017-2018, n.6.

<sup>809</sup> Official statistics on transgender and homosexual male prisoners in Italian prisons were released for the first time in 2017.

<sup>810</sup> Dalton, n.11; Dunn, n.133.

<sup>811</sup> Discriminatory treatment or violent actions descending from the State collection of personal data constitutes a human rights violation. The YP+10 affirms that States are obliged to process personal data for individual profiling in a way consistent with human rights standards, providing personal data protection and avoid this process leading to discrimination also on the grounds of SOGIESC (YP+10, n. 491, Principle 36 (F)).

<sup>812</sup> Interview with William, prisoner at UK-1 (28 November 2018).

<sup>813</sup> Ahmed, n.29.



*In New Hall [...] they didn't talk to me, the only reason why I didn't share with somebody [that I am a transgender man] is because I was still deemed at risk just coming to prison, but they did not acknowledge me, they didn't give me any information, they didn't help me at all.*<sup>814</sup>

By remaining “in the closet”, prisoners cannot access specific arrangements when it is necessary to ensure their security.

Data collected on the LGBTQ prison population of both jurisdictions present a different degree of accuracy. The 2018 HMPPS Annual Report on Equalities specifies how many transgender FTM or MTF, gender-fluid, intersex and non-binary people declared their identity, and where they have been placed within the gender binary prison system. Data on the overall LGB population are also included.<sup>815</sup>

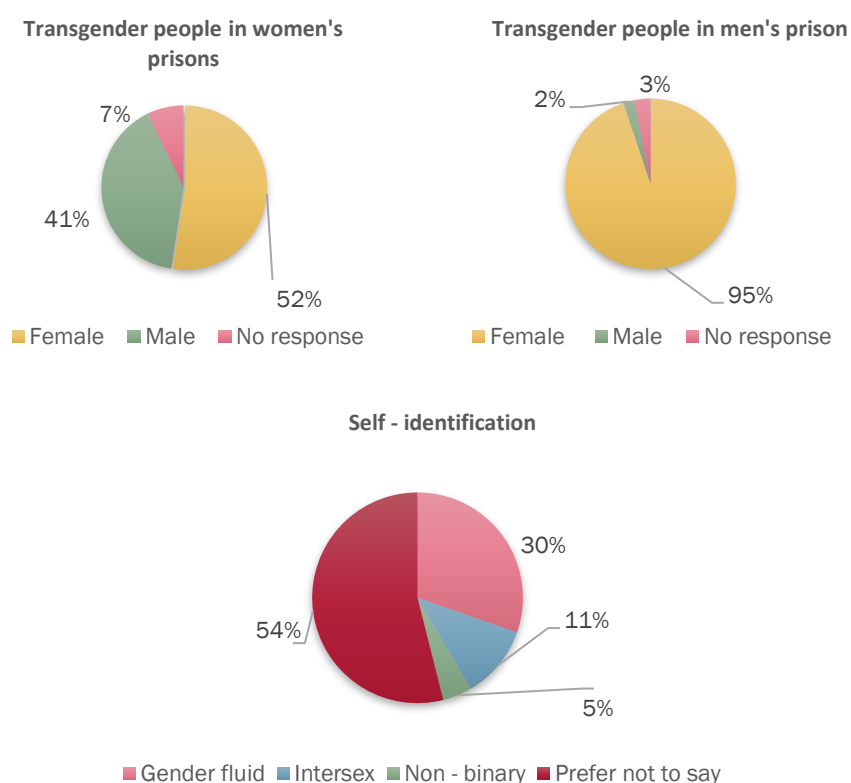


Figure 1: Prisoners' responses concerning their gender identity (HMPPS Equalities Annual Report 2017 - 2018)

<sup>814</sup> Interview with Daniel, prisoner at UK-2 (27 February 2019).

<sup>815</sup> According to 2018 data, there were 139 transgender prisoners. 111 prisoners reported their legal gender as male, 23 as female and five did not state their legal gender. There were 10 transgender prisoners from a Black, Asian or Middle-East (BAME) background. In terms of how they self-identified, 89 gave a response. 27 identified as gender-fluid, 10 as intersex, 4 as non-binary and the remaining 48 preferred not to say. Concerning sexual orientation, 97.3% of prisoners identified themselves as Heterosexual, while 2.7% identified as Gay/ Lesbian/ Bisexual or Other. HMPPS Equalities Annual Report 2017-2018, n.6.

On the contrary, the Italian Prison Service has data only on LGBTQ people living in special sections,<sup>816</sup> which do not break down what the category “transgender” represents and narrowly focus on men located in special sections for homosexual prisoners.

In both cases, the narrative concerning LGBTQ individuals remains a narrative of “othering” and minoritising as compared to the dominant cisgender heterosexual subject.<sup>817</sup> However, whereas the English system presents timid attempts to acknowledge the constant instability of sexual (and gender) categories,<sup>818</sup> the Italian Prison Service applies a masculine representation of sexual orientation by hiding the lesbian and bisexual subject, while stabilising the transgender person as compared to other cisgender prisoners, without considering the fluidity of transgender identities, which deserve a deeper problematisation.<sup>819</sup>

Provveditorati regionali	art. 32 (d.p.r. 30 giugno 2000 n. 230) *				Transgender		Omosessuali **	
	Numero sezioni		Presenti		Numero sezioni	Presenti	Numero sezioni	Presenti
	Femminile	Maschile	Femminile	Maschile				
Piemonte - Liguria- Val d'Aosta	–	7	–	159	1	6	1	8
Lombardia	1	11	1	374	1	11	–	–
Emilia Romagna - Marche	–	2	–	32	2	3	–	–
Veneto -Friuli V.G. - Trentino A.A.	–	2	–	24	2	9	–	–
Toscana - Umbria	1	5	3	279	1	10	–	–
Lazio - Abruzzo - Molise	–	2	–	34	1	14	–	–
Campania	–	6	–	65	2	5	1	14
Calabria	–	–	–	–	–	–	–	–
Puglia - Basilicata	–	–	–	–	–	–	–	–
Sicilia	1	3	12	41	–	–	–	–
Sardegna	–	–	–	–	–	–	–	–
<b>Totali</b>	<b>3</b>	<b>38</b>	<b>16</b>	<b>1.008</b>	<b>10</b>	<b>58</b>	<b>2</b>	<b>22</b>

Fonte: Dipartimento dell'Amministrazione Penitenziaria - Ufficio del Capo del Dipartimento - Segreteria Generale - Sezione Statistica  
Elaborazione a cura del Garante Nazionale - Unità operativa Privazione della libertà in ambito penale

Figure 2: Data on the numbers of prisoners hosted in special sections in Italy, including transgender and homosexual male individuals (Ombudsman for the protection of rights of persons detained or deprived of their liberty, Annual Report to Italian Parliament).

### 6.1.3 Bi-erasure: is there room for the “true” bisexual subject in prison?

The binarism and uni-directionality of sexual orientation in prison is well represented by participants’ considerations on bisexuality.

<sup>816</sup> Data from the Ministry of Justice as of 2018 reported that 22 homosexual men were hosted in special sections across all Italian prisons, while 58 transgender inmates were located in special sections across all Italian prisons. See Ombudsman for the rights of persons detained or deprived of their liberty, Report to Parliament 2018, n.364.

<sup>817</sup> In this effort to classify, interconnections among non-heterosexual and non-cisgender identities can arise on the basis of power relations. Butler, n.32, at 98. Buist, Lenning and Ball stress the the importance of data collection methodologies that can capture the fluidity of gender identities and sexualities: see Carrie L Buist, Emily Lenning and Matthew Ball, ‘Queer Criminology’, in Walter S DeKeseredy and Molly Dragiewicz eds., Routledge Handbook of Queer Criminology (2<sup>nd</sup> ed., Routledge 2018), 96-106.

<sup>818</sup> See Sedgwick, n.20.

<sup>819</sup> Strycher, n.16.

Three cisgender and one transsexual woman participating in the study identified as bisexual.<sup>820</sup> Elena, a transsexual MTF inmate hosted at ITA-3 described bisexuality as a phase she went through before beginning her transitioning process and falling in love with a transsexual woman. She questioned the necessity of defining such a relationship in terms of sexual orientation, and she wondered whether there were a way to qualify it. On the other hand, Concita and Gloria said they are bisexual since they are attracted to both men and women, yet Concita underlined that no one asked her about it while in prison, so she came out only when another inmate asked her.

At ITA-3 and ITA-4, some participants were critical regarding people who declare to be bisexual. Roman stated that if you were bisexual, you would not have a relationship with a transgender person. He concluded it would be as being “neither fish nor fowl”.<sup>821</sup> Roman seemed to see bisexuality as unrealistic: one must be either heterosexual or gay. Others believed that prisoners say they are bisexual to avoid being perceived as fragile as the homosexual subject.

This portrait is revealing of the prison dynamics, but also mirrors the more general erasure of bisexuality in the public discourse. Someone cannot be “truly” bisexual, as the bisexual individual causes disruption among identity groups.<sup>822</sup> In the context of prison, homosexual men feel threatened by bisexuality, as it is already incredibly hard to demonstrate their homosexuality and obtain protection. Hence, either they erase it by considering it a phase before ending in monosexuality, or they delegitimise it in order to avoid harassment or discrimination.<sup>823</sup>

On the other hand, bisexuality questions binary relationship dynamics: either you are straight or gay, with no in-between.

As a transgender person, bisexuality can be seen as a first signifier that one’s biological traits do not match with their self-perceived gender. Desire and identity here intersect and are sometimes conflated with each other.<sup>824</sup>

Yet, bisexuality is also “exploited” by heterosexual men or women. Particularly the former may try to be placed in special sections, where living conditions are better and there are more opportunities to engage in relationships. Besides implicitly confirming the toxicity of the prison macho environment and of sex deprivation policies, this strategy delegitimises bisexuality, as it associates it with promiscuity, making it visible but without truly acknowledging bisexuality as an orientation.<sup>825</sup>

Thus, when participants talked about bisexuality, they frequently stated that it is a fraud. Behaviour links here with desire: bisexual desire does not match with the coherent sexualities accepted within the prison framework,

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<sup>820</sup> Vade affirms that trans people can have all kinds of sexual orientations, were they straight, gay, bisexual or queer. Vade, n.80.

<sup>821</sup> Interview with Roman, prisoner at ITA-4 (22 August 2018).

<sup>822</sup> Yoshino, n.203; Hemmings (2002); Monro, n.76.

<sup>823</sup> Yoshino, *ibid.*

<sup>824</sup> Valdes, n.32.

<sup>825</sup> Yoshino, n.203, at 395-396.

and put at risk the essentialist foundations of the system, hence it must be stigmatised. In this perspective, the human rights framework includes bisexuality as part of the LGBT(IQ) acronym, but the heterosexual/homosexual divide has left only limited room for other dimensions of sexuality.<sup>826</sup>

#### 6.1.4 Identification and self-narratives around gender identities

The emergence of the transgender legal subject illustrates the perpetuation of narratives of pathologisation, in spite of some significant yet limited progress.<sup>827</sup> Such a mixed record is mirrored in prison policies regulating the location of transgender inmates adopted in England and Italy.

In England, the 2016 PSI on the care and management of transgender prisoners substituted the term transsexual with the more socially-informed, flexible definition of transgender, which is meant to “describe the ‘whole person’ (including mannerisms, appearance, pronouns etc.)”, thus including features that are not limited to sex and anatomy.<sup>828</sup> However, “the focus of the policy is, in the main, on those offenders who wish to live consistently in the gender with which they identify (opposite to the sex assigned at birth)”.<sup>829</sup> Gender fluid and non-binary people are also acknowledged: they will continue being allocated to prisons according to their legal gender, but specific management and *ad hoc* services should be organised by the prison staff.<sup>830</sup> Despite the welcome opening to a more fluid conceptualisation of gender, the policy has remained focused on more stable identities, aligning with the ECtHR interpretation of the ECHR.<sup>831</sup> Possessing a GRC<sup>832</sup> or presenting medically-based evidence (e.g. being treated for gender dysphoria) are considered stronger evidence than actual life evidence (e.g. the individual lives fully according to their preferred gender or has changed their name or appearance).

This can be problematic, as acquiring a GRC implies considerable costs and the assessment of a Gender Identity Clinic, which can take months or even years.<sup>833</sup> It can be particularly complicated for prisoners who are willing to transition behind bars, as GICs require evidence that the individual lives in accordance with their preferred gender (e.g. wearing gender-related clothing, wigs etc.), but it is not possible to do that in all prison establishments, as also reported by my participants.<sup>834</sup> Receiving gender reassignment surgery is extremely

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<sup>826</sup> Id. Gonzales-Salzberg, n.117, at 78. Gonzales-Salzberg points out that the notion of bisexuality has been rarely mentioned by the ECtHR, and only when citing international soft law instruments. The Court has constructed a narrative regarding homosexual identity, but has not considered other sexualities in terms of identity.

<sup>827</sup> These narratives are not challenged in the human rights discourse, including within the ECtHR case law: see Theilen (2018); Sharpe, n.592.

<sup>828</sup> PSI 17/2016, n.596, par. 3.2

<sup>829</sup> Ibid, par. 3.2.

<sup>830</sup> Ibid, par. 3.3.

<sup>831</sup> However, as seen in Chapter 4, the PACE and the CoE Commissioner of Human Rights adopted an approach open to self-determination. See PACE Resolution 2048, n.604; Commissioner of Human Rights, n.543.

<sup>832</sup> A certificate issued under the GRA which enables someone to be legally recognised in their acquired gender.

<sup>833</sup> Sarah Jane Baker, *Transgender Behind Prison Walls* (Waterside Press 2017), 18-20.

<sup>834</sup> Interview with Drew, prisoner at UK-2 (27 February 2019): ‘I think we should be able to have [...] clothes, cos we have packages getting sent in, and they are just sort it out now of actually getting binders. I asked them if I could buy a

complicated while in prison, if not impossible. More generally, staff are not always properly trained to grasp some of the particular issues affecting transgender people.<sup>835</sup>

Therefore, it can happen that transgender MTF offenders such as Kimberley end up being admitted to male prisons, where “people would take advantage of you, and you are sexually exploited. And all of the abuse, the attacks, it is not safe”. Prison staff can show indifference or hostility to prisoners’ sexual orientation or gender identity, as in the case of Drew mentioned above. However, he had a more positive experience at UK-2, in light of a more inclusive induction process.

The English system presents shortcomings, but it attempts to encompass various forms of gender identities and expressions, even if it is less clear how much consideration is given to prisoners who identify as non-binary or gender-fluid rather than transgender or transsexual.

In Italy, the new law on prison acknowledges for the first time sex, sexual orientation and gender identity as protected categories, while specific provisions call for protective measures to be adopted in case of prisoners who fear of being victims of aggression or bullying due to their SOGI. Reference to prisoners who are undergoing a sex reassignment process are also included in the law, which stipulates that the procedure should be guaranteed also during imprisonment.<sup>836</sup>

Despite developments in legislation, it remains unclear who the Italian legislator had in mind when disciplining the transgender subject. Neither the law, nor the prison instruction providing for the possibility of establishing special sections for transsexual prisoners<sup>837</sup> include a definition of gender identity. Indeed, the instruction uses the term transsexuality, which overlooks the social dimension of gender, while the law on legal recognition of gender identity still relies on a medical determination of one’s preferred gender.<sup>838</sup>

In this case, human rights standards anchored in pathologising narratives of gender identity leave room for national States to maintain ambiguous or regressive legislation on the subject.

This risks leading to essentialist evaluations from the Prison Service, depending on how feminine a transgender prisoner looks. A system based on fortuitous circumstances can hardly capture the spectrum of gender identities and expressions. In particular, transgender males may end up being overlooked as they more easily pass for cisgender people than transgender women.

Among Italian participants identifying as transsexual MTF, some had reservations in using the term

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binder off the prison, if they can find somewhere where I can pay for it, and I was waiting a while and they come to me where I was working and they said “oh, I’ve got sports bra” and I said “well, I don’t want a sports bra, I want a binder.””  
<sup>835</sup> International human rights have stressed on a number of occasions the importance of properly training public officials on issues regarding sexual orientation and gender identity or expression: see eg. YP, n.152, Principle 9; IESOGI, A/HRC/35/36, n.463.

<sup>836</sup> See Italian Law on Prison, n.394, Art. 1, 11, 14.

<sup>837</sup> Ministero della Giustizia, Dipartimento dell’Amministrazione Penitenziaria – Ufficio Centrale detenuti e Trattamento, lettera circolare prot. n. 500422, 2 May 2001 (Ministry of Justice, Prison Service Department, order n. 500422, 2 May 2001).

<sup>838</sup> Law 14 April 1982, n. 164 (1) (Official Gazette 19 April 1982, n. 164) (*Legge sulla rettificazione di attribuzione di sesso* - Law 164/1982).

“transsexual”, not necessarily for its essentialist, medicalising connotation, but because they said public opinion tends to associate it with prostitution, drug-related crimes, and overall neglect. <sup>839</sup> Still, interviewees hosted at ITA-3 were not familiar with the term transgender and continued using the definition of transsexual.

Participants stressed how gender identification is a very personal experience that goes beyond the mere sex change, and many reported how they had felt this way since a very young age.

Some interviewees observed that they were still undergoing a transitioning process while in prison. Drew at UK-4 portrayed the transitioning process as “a grey area”, which he has been waiting to overcome since he had entered prison. Others, like Silvia, associated being a transsexual woman with femininity and wished to undertake a hormonal treatment to align their gender with their self-perceived femininity. Similarly, Andrea, <sup>840</sup> a transsexual man at ITA-5, mentioned his masculinity and his desire to transition. His definition of gender identity relied heavily on a narrative of “being in the wrong body”. This feeling was associated by many participants with gender dysphoria, whose diagnosis was considered fundamental by Elena in order to access the necessary medical treatments.

While many interviewees focused on the final outcome of the transitioning process, i.e. becoming a “whole” man or woman, others, such as Elena, had a more nuanced vision of identities and classifications:

*“Categories serve to define you as a person. But I believe that it is a tad difficult to assign a specific definition to all these diversities or similarities that there can be among people who decide to undergo a process to change their gender identity. There are transgender or transsexual people who never even took hormones. Each one’s needs are different depending on the context that the person grew up in, and their personal feelings, or their degree of gender dysphoria.”*<sup>841</sup>

Thus, one could identify as a transgender person even without surgery. In addition,

*“Things can change with time, not only by taking or not taking hormones, but also in our life. Also the sexuality of a person can change over the years, depending on many factors, for example if you find a person who fits your needs.”*<sup>842</sup>

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<sup>839</sup> Interview with Teresa, prisoner at ITA-3 (7 August 2018): “I hate it, as people link the word trans [...] with prostitution drugs robberies alcohol and more, because we are still a little bigoted on this topic [...] For this reason I don’t like this word, but for trans I obviously mean either MTF or FTM depending on the circumstances, either a woman who wishes to become a man or a man who wishes to become a woman in the transitioning phase, as from the moment they reach their goal of changing sex, they are not trans”. (*La odio perché la parola trans [...] la gente lo collega subito a prostituzione droga rapine alcool e quant’altro, perché ancora si è un po’ bigotti su questo argomento [...] E quindi per questo non mi piace questa parola, però io per trans intendo ovviamente o MTF o FTM in base ai casi, o una donna che vuole diventare uomo o un uomo che vuole diventare donna nella fase di transizione, perché dal momento in cui una raggiunge l’obiettivo di cambiare sesso non è che è trans*).

<sup>840</sup> Andrea is a typical male name in Italy.

<sup>841</sup> Interview with Elena, prisoner at ITA-3 (7 August 2018): *le categorie servono per definirti come persona. Ma è un pochino difficile dare secondo me una nomenclatura specifica a tutte queste diversità o affinità che ci possono essere tra le varie persone che decidono di intraprendere un percorso di cambio di identità di genere. Ci sono trans che non hanno neanche mai fatto una cura ormonale però si definiscono transessuali. Ognuna è un po’ diversa a seconda del contesto in cui una persona è cresciuta, dei propri sentimenti personali o del grado della propria disforia di genere.*

<sup>842</sup> Ibid. Elena’s reflections reflects here Judith Butler’s theory of gender performativity.

Ultimately, the lack of precise guidelines in Italian prisons increases the uncertainty, fear and vulnerability of the transgender prison population, leaving specific circumstances unaddressed.

#### 6.1.5 The importance of the induction process – or lack thereof – and the challenges of coming out in the prison context

At their entry into prison, LGBTQ people meet for the first time members of staff they will have to interact with for the rest of their sentence. They will formulate an initial – often everlasting – opinion on how the prison they have entered deals with sexual and gender diversity. The legal frameworks of England and Italy does not fully capture the plurality of orientations and gender expressions characterising the prison population, even when they acknowledge the existence of non-heterosexual, non-cisgender identities. When they do so, they aim at qualifying identities through fixed categories.

Participants deemed it extremely important to be recognised as “different” from the hypermasculine essentialist prison legal subject: as “outsiders”, they feared for their bodily and psychological integrity.

In England, each convicted individual attends an induction that should be designed in accordance with the scope of the EA 2010. A representative should be appointed for each protected characteristics listed in the Act, including sexual orientation and gender reassignment.<sup>843</sup> The interviewees’ accounts clearly highlighted the difference between this type of induction and other procedures with a high chance to render LGBTQ prisoners invisible.<sup>844</sup>

Both UK-1 and UK-2 implemented the EA 2010. Representatives were appointed among members of staff, but also among prisoners, and participants had the opportunity to disclose their SOGI on a voluntary basis. They explained that the prison staff “sit you down and they talk you through everything. They give you like a welcome pack”<sup>845</sup> or they provide a “form to fill”<sup>846</sup> where “the choice is very limited. It is literally tick box: straight, gay, bisexual, prefer not to say, and that’s all the four choice you’ve got”.<sup>847</sup> The induction process, by assuming a fixed number of options representing sexualities and identities, represents the expression of the power of law as site of production of sexuality that excludes certain practices or desires, or distinguishes them through a heteronormative lens.<sup>848</sup>

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<sup>843</sup> See EA 2010, S. XX. An Independent Equalities Advisory Group has been created to provide external monitoring of the equalities work, while diversity training materials have been devised and introduced. See Susan Easton and Christine Piper, *Sentencing and Punishment: The Quest for Justice* (2<sup>nd</sup> ed., Oxford University Press 2011), 357-358.

<sup>844</sup> For instance, the Prison Inspectorate reported that a visit to Holloway, Bronzefield, and Drake Hall found that all three prisons had race equality procedures but there was little on sexuality. See Easton and Piper, *ibid.*, at 358.

<sup>845</sup> Interview with Kimberley, prisoner at UK-2 (27 February 2019).

<sup>846</sup> Interview with Craig, prisoner at UK-1 (28 November 2018).

<sup>847</sup> *Ibid.*

<sup>848</sup> Butler observes that “this can also be described as a process of recognition of desire that produces the human being: someone is human to the extent that their desire is deemed recognisable; to be acknowledged, the subject needs to conform to a given normative framework of acceptability.” Butler, n.80, at 32 and following.

Nevertheless, the procedure can change from prison to prison: participants noticed that in some estates they did not provide them with a form, nor were they asked questions on their gender and sexuality.

Simon and William were LGBT representatives, while Drew described his meeting with the transgender prisoners' representative. Their role within the wing was of

*“actually doing the inductions for all the new prisoners who come on the site. So [they have] a first-hand opportunity to possibly identify someone who may be hesitant of identify themselves as either bi-curious, bisexual or gay. So [they are] probably the first contact that they have when they come through the door, after the officers.”*<sup>849</sup>

Representatives encourage prisoners to come out, but only if they wish to: “look, if you do, if you decide yourself being with the same sex or the other sex be open about it, you don't fear about it.”<sup>850</sup>

Similar words coming from a fellow prisoner can help LGBTQ prisoners to overcome policies promoting identity erasure, particularly for those who had previous negative experiences with the induction at other penal estates.<sup>851</sup> Drew explained:

*“In New Hall an officer does your induction when you first come into prison, in here a prisoner does. Because they are prisoners, you feel more comfortable to ask questions, talk to them. And there is different sections, prisoners have different jobs, there is a listener, who is someone who works with the Samaritans [...] The particular one who came down was actually transgender. And that person was transitioning from female to male and he discussed his strand and the other strands in the diversity and how the prison sort of tries to fit, and to make sure that everyone is comfortable [...] the other one asked “what's happening, what are your feelings”, and they got me in touch with the Safe and Custody team to discuss if I needed any help. Then they came and saw me a few days later [...] I was so happy because I got a) recognised b) somebody came and talked to me and they said I could go to the groups, I could communicate with the people, I could sign a voluntary agreement to put things in place, and I didn't feel so alone, I didn't feel like I don't know how to deal with this.”*<sup>852</sup>

An induction genuinely tailored to prisoners' needs can change the prison experience of LGBTQ people from invisibility to visibility. The involvement of prisoners themselves in this process is beneficial to create a sense of community and responsibility, and helps alleviate frustrations:

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<sup>849</sup> Interview with William, prisoner at UK-1 (28 November 2018).

<sup>850</sup> Ibid.

<sup>851</sup> It must be noticed that the prevalent homophobia inside prison can make inmates reluctant to disclose information on their sexuality. The choice of representatives is thus particularly important. For instance, the Prisons and Probation Ombudsman reported that in one particular prison, the prisoners' diversity representatives were clearly hostile to prisoners who were open about their sexuality. The Ombudsman also raised concerns on the relation between sexuality and religious belief: ‘religious beliefs should be respected but this does not mean that discriminatory or antagonistic language or behaviour should be tolerated’ (Prisons and Probation Ombudsman 2011: 23); see Easton and Piper, n.844.

<sup>852</sup> Interview with Drew, prisoner at UK-2 (27 February 2019).



*“if it is your first time in prison, it’s a very nerve-wracking experience anyway without having to worry about your sexuality and everything else, whether you are going to get bullied or picked on purely because of that, so... this helps to put their mind at rest a little bit.”*<sup>853</sup>

Participants also highlighted the presence of listeners - volunteers for suicide prevention - to alleviate anxiety and episodes of self-harm in the first hours after admission.

The relevance of a carefully designed, equality-compliant induction becomes evident when analysing the different approach adopted by the prison management in Italy. Italian laws and policies acknowledge that people who fear of being at risk of bullying or aggression from other prisoners or staff only on the basis of their sexual orientation or gender identity deserve protection and provide for a system of special sections (*“circuiti”*) to address the problem. However, it remains unclear how prisoners should disclose such sensitive information at admission. The law leaves it to the discretion of each prison. Lorenzetti observes that the Charter of Prisoners’ Rights, a document published for prison internal use, could provide help, although it risks creating a differential treatment from prison to prison that may constitute discriminatory treatment under Art. 1 Prison Law, Art. 3 Constitution and the EPR.<sup>854</sup>

Participants reported that after arrest inmates can tell prison staff about their personal characteristics, but the staff is not obliged to enact procedures to allow inmates to come out.<sup>855</sup>

Participants’ accounts support the disorienting effects of such an undefined framework. ITA-4 is one of the two prisons in Italy that established a special section reserved for self-declared homosexual prisoners. Roman was transferred to ITA-4 precisely for this reason, after he initially avoided disclosing his sexual orientation for fear of repercussions. He initially signed a document where he consented to be placed together with the general prison population, but at some point he “could not do it anymore”. However, he had to make the first step and come out, since there was not any induction.

On the other hand, transgender offenders described the location process as a very casual assessment that highly depends on how feminine they look. Lack of a proper initial discussion concerning prisoners’ gender identity led some prison staff to place transgender MTF prisoners in special sections because they “look and act” as

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<sup>853</sup> Interview with William, prisoner at UK-1 (28 November 2018).

<sup>854</sup> As interpreted in light of CoM, Recommendation CM/Rec(2010)5, n.542.

<sup>855</sup> The Italian Implementing Regulation on Prison Law provides at Art. 23 that the Prison Governor or other representative holds a meeting with the newly admitted prisoner, where they collect the information necessary to create the prisoner’s personal file, and tell the inmate the internal rules concerning their rights and duties, their behaviour and their rehabilitation programme. They also must hand them the Charter of Prisoners’ Rights, and inform them of the possibility to access alternative measures to imprisonment and other prison benefits. It also generically refers to personal or familiar problems that require immediate action that the prisoner is encouraged to share with the prison representative. In this context, one could argue that issues related to sexual orientation or gender identity could be included. Clearly, staff training on diversity and equity is fundamental here to adopt the right approach in order for the subject to feel comfortable sharing this information in what it is generally perceived as a hostile environment. See D.P.R. 230/2000, n.726, Art. 23 (5) (7).

women. If they do not, such as in Elena's case, after arrest they may end up isolated, with no chance of enjoying fresh air, generally for days, but in the worst cases even for weeks.<sup>856</sup>

The Italian Ombudsman on the Rights of Persons Deprived of their Liberty warned against the establishment of special sections for homosexual and transgender prisoners when they substantially officialise a segregation regime, impairing these groups' rehabilitation process.<sup>857</sup> The law on Prison also affirms that separation through special sections to ensure security shall not prevent access to rehabilitation programmes.<sup>858</sup> Nevertheless, this legal principle does not often translate into practice, even if European and national standards are unequivocal on this point.

## 6.2 Placement of LGBTQ prisoners: protection or isolation?

In female prisons of both jurisdictions identifying as lesbian does not have consequences in relation to where the prison management will locate a cisgender woman sentenced to imprisonment, whereas the same cannot be said for homosexual or bisexual males, for transgender people and for subjects who do not feel as consistently belonging to one gender.

Henceforth, the identification process at admission acquires particular significance. Being placed in a general population wing as a homosexual man entails navigating imprisonment and one's own sexual orientation in a hypermasculine environment, which in turns may lead to hiding one's own sexuality to avoid physical and psychological abuse, or other forms of discrimination if a prisoner is considered too feminine, or presents characteristics stereotypically associated with homosexuality.

Transgender inmates represent an even more untenable challenge for the prison system, which is based on a strict gender binary divide.

As a general principle, the HMPPS clarified that all services must align with an Equality Analysis that takes into account considerations of equality when initiating any policies.<sup>859</sup> The Analysis shall consider the

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<sup>856</sup> Interview with Elena, prisoner at ITA-3 (7 August 2018): "If you are already taking hormones and you are a transsexual, and they can see you are trans, they place you directly in a trans section" (*Se prendi già degli ormoni e sei una transessuale, e vedono che sei trans, ti mettono direttamente nella sezione trans*). Yet, if the prisoner's looks are not so discernible, or if a transgender prisoner is transferred immediately to a male prison after arrest, for reason of territorial jurisdiction, "they place you in the first available prison. You spend a period of time, maybe a week – worst case scenario a month – in an isolated section, and then they transfer you in the closest trans prison" (*ti mettono nel primo carcere disponibile. Passi un po' di tempo, forse una settimana – nell'ipotesi peggiore un mese – in isolamento, e poi ti trasferiscono nel carcere [cit.] trans più vicino*).

<sup>857</sup> See e.g. Garante Nazionale dei diritti delle persone detenute o private della libertà personale. Relazione al Parlamento 2017 (National Ombudsman on the rights of persons detained or deprived of their personal liberty. Report to Parliament 2017), at [<http://www.garantenazionaleprivatiliberta.it/gnpl/resources/cms/documents/bc9d71fe50adf78f32b68253d1891aae.pdf>], accessed 9 December 2019.

<sup>858</sup> Law on Prison, n.394, Art. 14.

<sup>859</sup> National Offender Management Service (NOMS), PSI 20/2016, *Implementation of Equality Analysis*, 15 December 2016.

protected characteristics listed in the EA 2010, which include also sex, sexual orientation and gender reassignment. In so doing, the scope of the assessment should comply with the Public Sector Equality Duty detailed in the Equality Act, namely S. 149,<sup>860</sup> which applies also to prison location policies.

In a similar vein, the Italian Law on prison provides that rehabilitation programmes should respect prisoners' human dignity and protect them against discrimination, including on the grounds of sex, sexual orientation and gender identity, and shall favour the reintegration and resocialisation of all convicted persons.<sup>861</sup>

It is necessary to address what strategies the prison system has adopted to deal with the LGBTQ prison population besides general discrimination provisions, and what challenges they create in terms of human rights compliance.

### 6.2.1 Location of transgender prisoners

Feminist and queer theories have deconstructed the biological characterisation of sex and gender, but Prison Rules of both jurisdictions continue to embrace binarism by requiring that women prisoners shall normally be kept separate from male prisoners.<sup>862</sup>

The CoM of the Council of Europe uses broader terms in recommending

*The authorities should be particularly careful with the choice of prison (male or female) so as to adequately protect and respect the gender identity of the individual to be imprisoned. The significance of an individual's subjective choice is inseparably linked to objective criteria relevant to that person's identity. Therefore, the respect for gender identity does not imply, in this context, a right for an individual to choose arbitrarily his or her gender identity. In cases where the official documents are insufficient to determine the choice of prison, the authorities should carry out an objective assessment of the case, taking into account, not only, the subjective choice of the individual and the official documents, but also, for instance, the state of advancement of the process of gender reassignment.*<sup>863</sup>

In the prisons I visited, participants described different arrangements concerning their location which did not always amount to an "objective assessment" as provided by the CoM. In the female estates of both jurisdictions (UK-2 and ITA-5), transgender inmates MTF and FTM used to live together with the rest of the prison population. At ITA-5, Andrea had not initiated any surgery or medical treatments at the time we met, nor did he change his legal name. Therefore, he could "pass" as a woman in the eye of the Prison Service.<sup>864</sup> It is not

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<sup>860</sup> EA2010, n.675, S. 149. See Section 5.1.1 of this thesis.

<sup>861</sup> Italian Law on Prison, n.394, Art. 1.

<sup>862</sup> Prison Rules 1999, Rule 12(1). Italian Law on Prison, n.394, Art. 14.

<sup>863</sup> CoM, Recommendation CM/Rec(2010)5, n.542.

<sup>864</sup> Andrea was the only known prisoner identifying as transgender at ITA-5 according to my Point of Contact and to other participants. I use the term "passing" here, which the transgender community generally considers inappropriate to describe transgender people's experience, as the term implies "passing as something you are not", to reflect the Prison Service approach in assessing where to locate trans prisoners.

clear what would have happened if Andrea had already completed a gender reassignment surgery procedure, or if he “looked like a man”. On the contrary, transgender prisoners MTF that I interviewed in Italy were located in a special section within the male complex, separated from the rest of the prison population.

While the Italian Prison Service introduced a system of “special sections” to address the problem of transgender prisoners’ location,<sup>865</sup> inmates in England undergo a formalised assessment procedure to determine their location.

Transgender equality is a developing area of HMPPS policy.<sup>866</sup> This study refers to the sources in force during the data collection process, which took place between 2018 and early 2019. PSI 17/2016 on the *Care and Management of Transgender Offenders*, effective since the 1<sup>st</sup> January 2017,<sup>867</sup> replaced the previous regulations on the issue (PSI 7/2011). The reviewed policy is based on the following underpinning principle:

*“People who are living in a gender different to that of their assigned sex at birth should, as a general presumption, be treated by offender management services according to the gender in which they identify.”*<sup>868</sup>

To be allowed to express their gender, prisoners stipulate with the Prison Service a voluntary agreement which details specific arrangements to ensure that prisoners can safely use showers, align their appearance to their gender identity, and follow their rehabilitation programmes by feeling safe.<sup>869</sup>

Whereas the initial HMPPS approach focused on transgender prisoners who already possessed a Gender Recognition Certificate (GRC)<sup>870</sup> or had already been diagnosed with gender dysphoria, the 2016 Instruction includes pre-operative and post-operative transgender people, but also “offenders who have a permanent neutral (non-binary) gender identity and offenders who have a more fluid gender identity (including those who identify as gender-fluid and/or transvestite).”<sup>871</sup>

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<sup>865</sup> D.P.R. 230/2000, n.726, Art. 32(3).

<sup>866</sup> In 2015, the Women and Equality Select Committee’s Inquiry into Transgender Equality called for NOMS (now HMPPS) to review local decision processes for transgender offenders, and required that special attention should be paid to the care of transgender offenders. See House of Commons, Women and Equalities Committee, Transgender Equality - First Report of Session 2015–16, 8 December 2015.

<sup>867</sup> PSI 17/2016, n.596. The Instruction has been in turn replaced by the 2019 Policy Framework *Care and Management of Individuals who are Transgender*. See HMPPS, ‘The care and management of individuals who are transgender’, published 22 July 2019, available at [<https://www.gov.uk/government/publications/the-care-and-management-of-individuals-who-are-transgender>], accessed 11 November 2019.

<sup>868</sup> See Ministry of Justice, Review on the care and management of transgender offenders, November 2016, at [www.gov.uk/government/publications/care-andmanagement-of-transgender-offenders](http://www.gov.uk/government/publications/care-andmanagement-of-transgender-offenders), accessed 1 July 2019.

<sup>869</sup> See PSI 17/2016, n.596, Annex D.

<sup>870</sup> The Gender Recognition Act 2004 (GRA) regulates how to obtain a GRC. Conditions are strict: the applicant must be over 18 and have been diagnosed with gender dysphoria; they must have lived in the acquired gender for at least two years; and intend to continue living in the acquired gender until death. See GRA, Section 2. According to Alex Sharpe, the Act certainly requires “measurable gender crossing” which translates into a high degree of gender stability. Gender Recognition Act 2004, available at [<http://www.legislation.gov.uk/ukpga/2004/7/contents>], accessed 28 December 2019; Alex Sharpe, ‘Gender Recognition in the UK: A Great Leap Forward’ (2009), 18 Social and Legal Studies 2, 241-245.

<sup>871</sup> PSI 17/2016, n.596, 1.3.

Nevertheless, in spite of this more inclusive definition, the policy still focuses preferentially on prisoners who “expressed a consistent desire to live permanently in the gender they identify with which is opposite to the biological sex assigned to them at birth”.<sup>872</sup> Consistency and permanency do not represent a casual choice of words. They continue to convey an idea of stability over flexibility of identities, and *de facto* formalise a hierarchy within the assessment of gender identity, where non-binary and gender non-conforming people are taken into account, yet they occupy the bottom of an imaginary ladder where transgender people with a GRC, or who intend to identify permanently either as male or female, take precedence. The policy ultimately steps away from the more comprehensive definition promoted internationally by the Yogyakarta Principles, which elaborate a notion of gender identity associated with a personal sense of self and of one’s body.<sup>873</sup>

This is demonstrated by the evidence required from the HMPPS to decide where to locate transgender prisoners. Once a convicted prisoner expresses their intention to live in accordance with their preferred gender opposite to their sex assigned at birth, or is already in possession of a GRC, a Transgender Case Board must be convened within three working days of reception following sentence.<sup>874</sup>

This initial Board<sup>875</sup> is tasked with assessing the location of the transgender prisoner that must be determined in agreement with the offender’s view. The Board shall take a decision based on the prisoner’s vulnerability and health conditions, on the risk factors to other offenders, from offenders, self-risk and risk to staff. It shall reach a conclusion by analysing the evidence submitted by the prisoner.

Evidence provided can be qualified as full evidence, strong evidence, limited evidence or counterevidence. Full evidence is represented by a birth certificate confirming the prisoner’s legal gender, by the possession of a GRC, or by evidence of application for a GRC. Strong evidence is instead linked with how the applicant experiences their gender (e.g. if they make consistent use of pronouns reflecting their preferred gender, use prosthetics or clothing in line with their preferred gender, and so on). Lack of consistency in this area, or the absence of some or all necessary medical documents, as well as a lack of presentation of gender identity in daily life all constitute examples of limited evidence. Finally, if the reason for requiring to be identified with a gender opposite to the prisoner’s biological sex depends on the sentence received, or on attempts to get closer to possible victims during imprisonment, the Board will consider these as counter evidence.<sup>876</sup>

The current system constitutes an improvement from the previous procedure, if only because it acknowledges the existence of different ways to express gender identity, and the transgender applicant shall be involved in the process.<sup>877</sup> The policy has been praised as an example of best practice by organisations such as the

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<sup>872</sup> Id, 1.2.

<sup>873</sup> YP+10, n.491, Preamble.

<sup>874</sup> PSI 17/2016, n.596, 5.2.

<sup>875</sup> The Board includes representatives of the prison governor, of offender managers and supervisors, of medical experts, and of the Equalities team. PSI 17/2016, n.596, Annex C.

<sup>876</sup> There are other two types of Case Boards: a Local Review Case Board that must be convened any time the transgender prisoner has a complaint in relation to the agreement taken with the prison management, or further evidence has been submitted, or circumstances have changed. A centrally managed Case Board is foreseen for offenders younger than 21 and for more complex cases.

<sup>877</sup> In this sense, see also Baker, n.834.

Association on the Prevention of Torture.<sup>878</sup> It also seems to have integrated relevant case law concerning this issue. In *R (on the application of AB) v Secretary of State for Justice, The Governor of HMP Manchester*,<sup>879</sup> a pre-operative transgender woman challenged the Secretary of State decision to keep her within the male prison estate rather than placing her in a female prison, on the grounds that the crimes she was convicted for (including attempting rape of a female) were committed when she identified as male. However, the Gender Identity Clinic would not consent to surgery without the applicant living for at least two years in accordance with her preferred gender, so she had to live in a female prison. The High Court found that the Secretary of State interference with the prisoner's personal autonomy amounted to a violation of Art. 8 ECHR. Most importantly, the Court established that the risk represented by having a transgender offender accused of rape in a female prison could be managed, while the Secretary of State's decision was disproportionate. This outcome dismantled one of the main justifications adduced by the Prison Service to not hold transgender prisoners in estates in line with their self-identified gender.

One major concern about the evidence-based mechanism relies on the difficulty of presenting the necessary documentation for inmates who manifest the intention to obtain the legal recognition of their gender identity after being admitted into prison, or for long-term or life prisoners who struggle getting access to healthcare, or who may encounter opposition from prison staff and management in their desire to align their appearance with their preferred gender, based on security justifications.<sup>880</sup> Furthermore, even when a transgender prisoner's gender identity is legally recognised in official documents, they may still be sent to a male prison at admission. For instance, after conviction Kimberley was admitted to a high security male prison. She was placed in isolation in the healthcare wing at least for the first 24 hours, without receiving a proper induction. This can prove to be problematic, as the first weeks in prison are critical for prisoners' well-being and risk of self-harm.<sup>881</sup>

The difficulty in acquiring the necessary evidence to obtain a GRC if the applicant has started or continued their transitioning process in prison has been highlighted in *Jay v Secretary of State*.<sup>882</sup> The case concerns a former detainee's request to change their legal gender before a GR panel, and the repeated unnecessary and unjustified rejection issued by the panel on the basis of insufficient medical evidence. Although the case does not concern conditions of imprisonment of transgender inmates, the lack of consideration of the practical burdens attached to prison conditions for a transgender person are relevant to all prisoners who undertake this process, and has been found in violation of Art. 8 and 14 ECHR. The judge's consideration that "the GRA is a statute designed to facilitate gender recognition [whose] regime should be permissive rather than

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<sup>878</sup> APT, n.10.

<sup>879</sup> [2009] EWHC 2220 (Admin).

<sup>880</sup> Baker, n.834.

<sup>881</sup> See e.g. Dr Tom Marshall, Dr Sue Simpson and Professor Andrew Stevens, *Health care in prisons: A health care needs assessment* (University of Birmingham, 2000).

<sup>882</sup> [2018] EWHC 2620 (Fam).

restrictive”<sup>883</sup> should apply *mutatis mutandis* also to the Case Board’s interpretation of Prison Instructions on the Care and Management of Transgender Prisoners.

My participants highlighted how the instruction does not tackle the fact that transgender prisoners, gender non-conforming and non-binary people can find themselves at different stages of their transitioning process, either at admission or during their prison time. Even if they did not say it explicitly, they seemed to imply that the Board system does not ensure timely modifications to the agreement concluded between the offender and prison staff at admission. For instance, my Point of Contact at UK-1 allowed me to read a Transgender Case Board record, where the Board members recommended a psychiatric evaluation for the applicant to assess the presence of any mental illnesses. Months after the recommendation was issued, it was reported in writing that the psychiatric evaluation still had to take place, suggesting a lack of adequate resources that can impair transgender prisoners’ well-being.

Drew described his first entrance to prison before being transferred to UK-2 as one of indifference towards his needs:

*“When I first got into the prison I told them [the prison staff] I was transgender, I tried to explain to them what happened [...] They did ask my sexual orientation. They did ask specific questions when I come in. And I told them obviously I have always been a transgender [...] They say ‘make an appointment with a doctor to talk about your situation’ but nothing happens, nobody comes.”*<sup>884</sup>

Drew’s narrative is concerning, as he never mentioned the convening of a local Case Board by the prison management of the first estate he was in. Since Drew used to live as a lesbian before being convicted and did not have strong evidence to support his request to be treated as a male, his demands were ignored until he entered UK-2. Here things changed: “they gave me more options, they said I didn’t have to, but if I signed a transgender agreement, I could have pacific [sic] things put in place to help me transition while I was in here.”<sup>885</sup> This difference in treatment between prison establishments, besides representing discriminatory treatment, contextually increases the sense of uncertainty and unreliability characterising the prison experience of LGBTQ people.<sup>886</sup>

### 6.2.2 Special sections for transgender prisoners: protection or isolation?

In spite of its shortcomings, the English system goes in the right direction by attempting to tailor the assessment of prisoners’ location to their specific situation. Listening to participants’ accounts, it could be concluded that

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<sup>883</sup> Id, par. 93.

<sup>884</sup> Interview with Drew, prisoner at UK-2 (27 February 2019).

<sup>885</sup> Ibid.

<sup>886</sup> Crewe, n.189.

in general the situation of transgender inmates is more positive in female prison establishments. Forms of separation causing possible trauma and health care concerns take place more commonly in male settings.

The criticalities of a one-size-fits-all approach become more evident if looking at the Italian penal system.

The Prison Service addressed the issue of placement of homosexual male inmates and transgender prisoners in two main ways: either by placing them in special sections, which are in all but one case<sup>887</sup> located in male prisons, or by placing them in vulnerable prisoners' wings, along with other vulnerable categories (e.g. ex-police officers, sex offenders).

Italian transgender participants agreed with having a special section for transgender prisoners as an essential factor for their own security, due to the risks of living in a male prison as a transgender female, particularly in light of a sex prohibition policy, lack of private visitation programmes for partners and a culture of hypermasculinity: "even if the situation is explosive, it is necessary to have a section dedicated to trans prisoners."<sup>888</sup>

By stating this, Elena underlined one major problem of establishing a special section for transgender prisoners. Art. 14 of the Prison law states that transgender and homosexual prisoners who fear being victims of aggression or bullying because of their SOGI can be placed in these sections as "homogeneous groups". Looking at the *travaux préparatoires* for the prison reform bill, homogeneity seems to relate to the existing situation of special sections placed in various prisons across the country, which the law renders official.

However, transgender people at ITA-3, but more generally in every context inside and outside prison, are far from being "homogeneous". Homogeneity does not consider the unavoidable issue of intersectionality. A consolidated concept in international law,<sup>889</sup> characteristics such as sexual orientation, age, class, race, sex or gender identity should not be considered individually, but as intersecting factors that inform individuals' experience. In the transgender section at ITA-3 there were two Italian, one Colombian and seven Brazilian people. Frequent conflicts erupted in the section, due to isolation and psychological and physical health factor, but also to unaddressed class, cultural and language barriers. Elena cited episodes of jealousy among trans inmates competing for the attention of the same guy, and called these dynamics "feminine problems". I would put it differently by arguing that the prison system decided to overlook the humanity and complexity of transgender offenders, who come from different backgrounds, and may belong to different cultures and traditions. These factors, along with isolationist practices perpetuated by the prison management to keep these individuals separate from "the men", produce a very tense environment. Meetings organised with a social worker and a criminologist to deal with these tensions could not solve the ontological problem at the basis of this arrangement.

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<sup>887</sup> A special section for transgender prisoners has been created from an existing wing at Sollicciano prison in Florence.

<sup>888</sup> Interview with Elena, prisoner at ITA-3 (7 August 2018): 'The presence of a special section is important. A trans section is explosive and difficult to manage, but it is fundamental that it exists'. (*é importante che ci sia una sezione speciale. E già secondo me è esplosiva in una sezione trans, ed è difficile gestione, però è fondamentale che esista*).

<sup>889</sup> See e.g. A/HRC/38/43, n.530; Richardson and Monro, n.32.



Therefore, it is understandable that my participants declared in all but one case they would rather live in a female prison. Some of them had first-hand experience of living in a female estate and could explain that in there transsexual women had more liberty, mainly because the staff would not think that a transsexual woman could have sex with another woman.<sup>890</sup>

The conflation between sex, sexual orientation and gender emerged prominently, echoing Valdes' theory:<sup>891</sup> in this scenario, transsexual women are equalised to cisgender women who cannot but be heterosexual.

There seems also to be an implicit narrative of women not having sex the same way men do (perhaps without violence) or being "asexual", in the sense that there is no worry that they can indulge in sexual conduct. Still, participants from ITA-5 used to have relationships inside prison, or to know of other inmates who did.<sup>892</sup>

Nonetheless, this arrangement opened up more possibilities for transgender prisoners to engage in activities together with the main prison population.<sup>893</sup>

Andrea also asserted he would rather live in a female prison, where the atmosphere is more relaxed. However, Concita pointed out that some prisoners contest the presence of transgender people in a female prison if they did not undergo surgery and still have male genitalia, suggesting that episodes of transphobia can take place even in female settings.

Participants were finally asked their opinion on creating a special prison for transgender inmates. A similar project had been promoted in 2010 by the Tuscany region in Italy to convert an existing prison into a transgender-only penal estate, but was later aborted for political reasons.<sup>894</sup>

In both jurisdictions, transgender interviewees were sceptical about this approach, which was interpreted as a way to increase prejudice against the transgender community. Only Elena pondered this idea, stressing that it could have the potential for a positive impact on transgender prisoners' lives, depending on how such a project would be developed. Particularly, she pointed out that staff should be appropriately trained to work in this

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<sup>890</sup> Interview with Elena, prisoner at ITA-3 (7 August 2018): "in prisons where transsexual people were in a female section there was more liberty, as they never thought that a trans person had sex with a woman and therefore they allowed, I don't know, for example open air or activities together with other prisoners" (*nelle carceri in cui le persone transessuali erano in una sezione femminile intanto c'era più libertà, perché non pensavano mai che un trans avesse fatto sesso con una donna e permettevano ad esempio non so, gli spazi aperti o non so attività in comune*).

<sup>891</sup> Valdes, n.32.

<sup>892</sup> Although this appears to be linked with stereotypical assumptions, the more relaxed approach overall to transgender prisoners in female estates seems to confirm Greer's observation that intimate relationships are more accepted by prison management than in the past, while it contrasts with Carlen's argument that women prisoners are subjected to stricter surveillance than men (at least in relation to the security risks attached to having trans and cisgender women together in common areas). Greer, n.250; Carlen and Worrall, n.241. Carlen has more recently reviewed her initial approach by clarifying that women have historically been treated differently than men in prison, and that certain aspects of imprisonment imposed equally on men and women affect the latter more harshly (e.g. separation from children): Carlen, n.238, 3-9.

<sup>893</sup> Interview with Teresa, prisoner at ITA-3 (7 August 2018): "In Sollicciano [a female prison in the centre of Italy] it is different, because the prison officers are men, but we are in a female section, so we do activities with women, including school courses, there are many activities while here there is nothing" (*a Sollicciano è diverso perché gli agenti sono comunque uomini però siamo in una sezione femminile quindi le attività le facciamo con le donne, la scuola anche, ci sono un sacco di attività mentre qui non c'è nulla*).

<sup>894</sup> Dias Vieira and Ciuffoletti, n.270.

prison, and that a team of social workers and psychologists capable of comprehending and addressing the specific needs of transgender individuals should be present.<sup>895</sup> By saying this, Elena implicitly highlighted some of the main issues affecting transgender prisoners' lives in current penal estates. In addition, a special prison would attract transgender prisoners from all over the country, compromising the objective affirmed in national and European legislation to guarantee that prisoners spend their sentence not far from their family or social community.<sup>896</sup>

### 6.2.3 Special sections for homosexual male prisoners: annulling plural identities?

Both homosexual male participants in England and Italy agreed that special arrangements in terms of location for prisoners who identify as gay or homosexual are important to ensure that they are better protected.<sup>897</sup> However they had different ideas regarding the width of the separation regime. For example, Riccardo at ITA-4 believed that it is "much better to have a section", as "a mixed section" could work only if it was composed of single cells.<sup>898</sup> Still, it was okay for him to spend time in common areas together with the main population and avoid isolation.<sup>899</sup> On the other hand, Roman decided to ask to be placed in the special section at ITA-4 as he could not hide his sexual orientation anymore.<sup>900</sup>

As mentioned before, the new law on prison introduced the concept of homogeneous sections for transgender or homosexual prisoners, but it is not clear if it refers to existing special sections such as the one at ITA-4, or if the Prison Service plans to establish new ones across the Italian territory.

At present, homosexual inmates in other penal establishments either live together with the main population,

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<sup>895</sup> Interview with Elena, prisoner at ITA-3 (7 August 2018): 'It must have specific characteristics, people who are adequate to look after specific people, social workers, psychologists, a whole system designed to take care of specific people. Otherwise, if I don't have prison staff who have attended perhaps a training course, or social workers who do not realise what the situation is, or psychologists who know the issues, it does not make any sense' (*Deve avere determinate caratteristiche, deve avere comunque avere delle persone adatte a seguire determinate persone, delle educatrici, delle psicologhe, tutto un sistema approntato a seguire determinate persone. Altrimenti non ha nessun senso, se io non ho gli agenti penitenziari che hanno seguito magari un corso, le educatrici che non hanno ben presente qual è la situazione, o delle psicologhe preparate sul tema*). A special prison should eventually consider the different forms of gender identities and expressions characterising the transgender community, starting from the different needs of a transgender MTF person as compared to a transgender FTM one.

<sup>896</sup> See *Commissione Giostra*, n.773.

<sup>897</sup> Their concern reflects the Yogyakarta Principles pledge to introduce protective measures for LGBTQ prisoners without imposing greater restrictions on them as compared to the general prison population (Yogyakarta Principles, n.152, Principle 9). The UNCAT and other UN bodies have instead denounced the involuntary segregation of homosexual male prisoners from other inmates, caused by episodes of hate speech, violence, degrading and humiliating treatment. See CAT/C/ARM/CO/4, n.464, par. 31; E/CN.4/2005/101, n.464.

<sup>898</sup> Interview with Riccardo, prisoner at ITA-4 (22 August 2018) (*è molto meglio avere una sezione speciale [...] Un conto è essere detenuto in una sezione dove, dove si è tutti misti. Forse potrebbe anche funzionare, eh, se ci sono le celle singole potrebbe funzionare. Con le celle singole*).

<sup>899</sup> Ibid: "A different thing is to be mixed [with other prisoners] during the open air, where you are also monitored [...]" (*un conto è le ore d'aria dove si è misti, ma sei anche controllato*).

<sup>900</sup> Interview with Roman, prisoner at ITA-4 (22 August 2018): "I know my sexual identity and I tried to hide it as much as possible [in prison]; hide, hide, hide until one day I said I can't, I can't do it anymore" (*la mia identità sessuale la conosco e dico, cerco di mascherarla il più possibile; maschera, maschera maschera finché un giorno ho detto non ce la faccio, cioè io non ce la faccio*).

often hiding their sexuality, or they are placed in vulnerable population wings.

The latter is also the case of England. Prisoners who identify as homosexual or transgender can be segregated in Vulnerable Prisoner Units (VPUs) when they are deemed to be in need of protection from the general population. Research conducted across the HMPPS shows that individuals enter the VPUs through three main paths: they can request it, they can be assigned to the VPU after reception, or moved there after an initial period in the main wing.<sup>901</sup>

Homosexual interviewees and one transgender participant<sup>902</sup> were located in a VPU at UK-1. Participants believed that “there is no need for a special wing for gay people, if they are uncomfortable with being gay they don’t have to identify as gay when they are coming to prison”, while “having a specialist wing would shine a spotlight on gay people.” They also affirmed that identifying as gay in the VPU “is not a problem, as there is not much bullying going on anyway, it is easier to identify as gay in this wing”, which compared to the mains “looks like a hotel.”<sup>903</sup>

It seems that homosexual participants did not like to be separated from the rest of the prison population, but at the same time they did not feel safe to express their sexuality outside a special location. However, Simon and William pointed out that not all VPU are like the one at UK-1, which represented an exception due to the higher awareness of prison staff about issues of sexual and gender diversity. They shared some concerns regarding the possibility of moving to different prisons, where they had heard of more frequent episodes of bullying or other forms of discrimination against LGBTQ inmates.<sup>904</sup>

It appears that in some way both jurisdictions penalise people of different sexual orientations and gender identities for their status, either by being “singled out,” to use participants’ words, or by being located together with groups who are not well received by the rest of the prison population. This risk leads to further stigmatisation by association.<sup>905</sup>

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<sup>901</sup> Carol McNaughton Nicholls and Stephen Webster, The separated location of prisoners with sexual convictions: Research on the benefits and risks – Analytical Summary 2018 (HMPPS 2018), at [[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/749149/separated-location-prisoners-with-sexual-convictions-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/749149/separated-location-prisoners-with-sexual-convictions-report.pdf)], accessed 25 July 2019.

<sup>902</sup> Keira spent some time in the main wing before being transferred to the VPU, as she submitted a request after coming out as transgender. Since only a couple of transgender individuals were hosted at UK-1 before her, the management decided Keira was eligible to be transferred to the VPU.

<sup>903</sup> Quotes from interviews with William, Craig and Simon, prisoners at UK-1, (28 November 2018).

<sup>904</sup> McNaughton Nicholls and Webster conducted 27 in-depth interviews with inmates located in four English prisons and found that “the greater the number of VPs who were not convicted of sexual offences, the more negatively the environment was described. In contrast, when there was a higher concentration of prisoners who had committed sexual offences, the prison environments were described as being calmer and more relaxed.” (McNaughton Nicholls and Webster, n.903). The data sample I analysed does not point to the same conclusion, but there may be a correlation between the negative attitude against sex offenders and forms of homophobia and transphobia that are associated with a sexualisation of sexual orientation and gender identity.

<sup>905</sup> Interview with Simon, prisoner at UK-1 (28 November 2018): “You are seen as a sort of rapist, or a pedophile, or similar like that. You may not be, no one has got any idea why you are on the wing, but anybody is stigmatised with the same thing. So to have yet another layer like that would give them another reason to be more at you, really.” McNaughton and Webster reached a similar conclusion with their study: placement in a VPU wing determines a reinforcement of the negative labelling on behalf of the general prison population against all inmates living in the VPU.

These arrangements may be useful temporarily, but they do not address the underpinning cultural issues of queerphobia characterising the prison system. Contrarily, they perpetuate strategies fuelling invisibility and surveillance through separation that paradoxically prevent LGBTQ inmates from integration, and increase the risk of them being targeted by other prisoners.

#### 6.2.4 The essentialist paradigm brought to the extreme: the case of ITA-3 special section

The essentialist paradigm and the conflation between sex, gender and sexual orientation characterising the prison system reached its extreme consequences when the prison management at ITA-3 decided to create a special section gathering together transgender prisoners and inmates who declared themselves to be homosexual to prison staff. The experiment had serious negative consequences that led the Prison Service to split the section and transfer the homosexual inmates hosted at ITA-3 to ITA-4. Many of my Italian participants had personally experienced this change, while others who were later hosted in these penal estates heard rumours about what happened, signalling the traumatic impact this experience left on both groups.

Problems arose when some prisoners pretended to be homosexual in order to have sexual contacts with transgender women hosted in the section, or to flirt with some trans prisoners they saw during the open-air time. Some underlined that the cohabitation proved to be extremely difficult due to the lack of adequate space to host all the persons involved. Still, “the biggest problem was sexual activity between trans women and people who pretended to be gay.”<sup>906</sup>

This episode demonstrates the carceral system’s tendency to consider sexual orientation and gender identity as ontologically equal, and to conflate sexual orientation with sex. In addition, it confirms the bi-erasure characterising prison policies. The prison staff did not consider the possibility of fluidity of sexualities and identities, nor had they contemplated that transgender women and declared homosexual males could become intimate with each other.

The sex prohibition policy also led heterosexual males to find ways to work around it, while the lack of a proper induction prevented the prison management from – at least – monitoring possible false declarations coming from prisoners. Ultimately, by placing GBTQ people together, the prison management conducted an operation of “othering” minorities who are not cisgender and/or heterosexual, without considering the necessity of individualised measures of protection for members of these groups.

The special section system avoids tackling the inherent inequality of the carceral state. As will be examined later, these arrangements risk promoting forms of additional victimisation of LGBTQ prisoners, and do not challenge the prison masculine normative paradigm, as well as the beliefs and attitudes of other prisoners and staff.

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<sup>906</sup> Interview with Riccardo, prisoner at ITA-4 (22 August 2018) (*il problema più grosso era il sesso tra le transessuali e uomini che si fingevano gay*).

### 6.2.5 Concluding remarks on identification and location policies: the perils of coming out

Interviewees described prison as a “macho environment” populated by “alpha male types”, where one would not advertise their homosexuality or non -cisgender identity. This applies specifically to the main wings of prison establishments, while in special sections, were they VPU or areas specifically dedicated to homosexual or transgender people, coming out is a slightly easier experience, although one would not “shout out” their sexual orientation.<sup>907</sup>

Realising the attraction to a person of the same sex can be “shocking” or “unexpected”,<sup>908</sup> while the coming out experience turns out to be more than a one-time action. It can also have a snowball effect: “then when also I came out we found out there were actually more people in prison who would actually come out as well”.<sup>909</sup>

Some transgender and cisgender participants underlined how the act of coming out, or of coming out by starting a relationship with another prisoner, elicited a number of rumours concerning their sexuality.<sup>910</sup> This can be a cause of concern for women who have a partner and family outside and fear that someone could tell them, as information circulates very quickly in prisons that host inmates with close ties with the community surrounding the prison estate, such as in the case of ITA-5, which occupies a large portion of the neighbourhood.<sup>911</sup>

Even in female prisons, where same-sex relationships are tendentially accepted with some caveats, the act of coming out, and more generally the cohabitation of different sexual identities, can represent a cause for disruption within the prison community. Macro and micro structure of power, and the influence on their acts of visibility, cannot be forgotten by LGBTQ prison minorities.<sup>912</sup>

The perils of coming out were common to participants of both jurisdictions, despite the different approaches to recognising and protecting minority groups, in a continuous shift between visibility and invisibility. When an inmate comes out, they are able to emerge as subjects among the crowd, but they are also singled out. When this happens, the two legal systems take different paths: the Italian Prison Service tends to group them and separate them, at risk of making the non-heterosexual, non-cisgender subject, invisible again. The English system makes more effort to capture the fluidity of identities and genders, with mixed results. Data accounts

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<sup>907</sup> Interview with Simon, prisoner at UK-1 (28 November 2018); Interview with Craig, prisoner at UK-1 (28 November 2018). Still, the experience of coming out in the CJS is particularly painful, and dangerous, for transgender people: see Whittle (2006), n.16.

<sup>908</sup> Interview with Vera, prisoner at UK-2 (27 February 2019).

<sup>909</sup> Interview with Craig, prisoner at UK-1 (28 November 2018).

<sup>910</sup> Interview with Concita prisoner at ITA-5 (28 August 2019): “There is as a principle a prison ‘boom’, right? Everyone talks about you. Everyone knows anything” (*il principio è il boom del carcere no? Tutti parlano di te. Tutti sanno tutto*).

<sup>911</sup> Interview with Goliarda, prisoner at ITA-5 (29 August 2019): “Many prisoners do not expose themselves, as they are ashamed, or because they are involved in certain situations outside, or because they have husbands outside [...] For instance, Emanuela [a former prisoner at ITA-5] knows my sister who is outside [...] imagine if she gets to know that I am...” (*altre detenute non si espongono perché si vergognano, per una situazione legata a quello che succede all'esterno. E per il fatto che hanno dei mariti, soprattutto dei mariti fuori [...] Per esempio, Emanuela conosce mia sorella che è libera [...], pensa se venisse a sapere che sono...*)

<sup>912</sup> Kitzinger, n.376.

and case law illustrate the tendency to go back to biological determinations when considering transgender individuals. Regarding homosexual prisoners, by locating them together with prisoners who are attacked by the general prison population, such as sex offenders, sexual orientation becomes equalized to very serious crimes with negative moral connotations, thus reiterating a narrative of sexuality as deviance.<sup>913</sup>

On the contrary, the Italian Prison Service's inability to properly assess the spectrum of sexual and gender identities characterising the prison population facilitates the phenomenon of "fake gays", where heterosexual prisoners pretend to be homosexual to be placed in a special section, which is less crowded and deemed to have better conditions than the general wings.<sup>914</sup> Roman believed that the obliviousness of prison staff and other prisoners on the subject of sexual orientation contributed to cause similar situations, which negatively impacts homosexual males, who are consequently considered less trustworthy by association.<sup>915</sup>

It is not coincidental that such separation takes place in male prisons fuelled by hypermasculinity and chronic problems of overcrowding and poor living conditions. Contrariwise, women prisons seek to integrate different groups, although it could be argued that prison policies generally overlook women prisoners and represent them in opposition to the male prisoner archetype.<sup>916</sup>

Moments of visibility and protection can and shall be maintained during prison time to substantially ensure prisoners' human dignity. A sense of community could help in achieving this goal. For instance, Drew underlined how prison staff were not prepared to give him essential information to initiate his transitioning process, such as how to legally change his name. Other prisoners came in support, in what could be seen as a queer act of resistance: "it was other people that I'd met that would help me, other prisoners that would [...] show me like 'I did this or somebody I know who did that' and that's how I could get ahead and change my name."

This was possible also because Drew was not isolated from the general prison population.

### 6.3 The implementation of the right to health in prison

The recognition and protection of the right to health in the context of prison represents one of the most serious challenges faced by prison authorities. Prison health intersects medicine and law enforcement. Health problems are disciplined within a framework based on surveillance, security and sanctioning.<sup>917</sup> The linkage between

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<sup>913</sup> Dalton, n.11; Ball (2014), n.48.

<sup>914</sup> Interview with Roman, prisoner at ITA-4 (22 August 2018).

<sup>915</sup> The necessity of appropriate training for State public officials on issues of sexuality and gender identity is one of the main recommendations issued by international human rights mechanisms to States: see e.g. YP; IESOGI (2018).

<sup>916</sup> Hannah Moffat, n.266; Carlen, n.241 and n.238.

<sup>917</sup> Katarina Tomasevski, 'Prison Health Law' (1994), 1 European journal of Health Law, 327 – 341.

medicine and law often produces disharmonised concepts, due to the complicated dialogue between two areas of knowledge using a different language to achieve goals that do not completely coincide.<sup>918</sup>

LGBTQ prisoners are particularly vulnerable subjects when they interact with health care providers.

The prison environment increases mental and physical health issues affecting queer minorities. An induction and location process causing invisibility and isolation affect prisoners' health. As an additional concern, the application of medical notions and practices on sexuality and gender can be manipulated towards a pathologisation of queer identities and a consolidation of a biological determinism-based discourse.

The intersection between health and human rights has favoured a shift in the organisation and scope of prison health, which used to be managed as part of the penal system, whereas it is now regulated as a branch of healthcare policies in light of the principle of equivalence of care.<sup>919</sup>

In England, the National Health Service has been responsible for taking care of health conditions in public prisons since 2006.<sup>920</sup> The NHS Primary Care Trusts (PCTs) are responsible for monitoring the performance of prison healthcare, and for providing prisoners with good quality health resources, while the Prison Service has a duty of care towards prisoners and shall support the delivery of health services for all prisoners.<sup>921</sup>

Similarly, prison governors are responsible for the overall management of prison health care, while PCTs shall take care of individual clinical performance.<sup>922</sup>

Access to healthcare must be assured to prisoners within 24 hours from their entrance to prison; clinical records should be completed within the same timeframe. A health screening in the first hours after admission has been proven to be essential to prevent episodes of self-harm.<sup>923</sup>

Some participants were satisfied by the health care services provided in prison, and they confirmed that they had better health care inside prison rather than outside, thanks to the coverage of costs on behalf of the NHS.<sup>924</sup>

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<sup>918</sup> *Id.*

<sup>919</sup> The principle of equivalence of care provides that all necessary medical, surgical and psychiatric services available in the community shall be provided to each prisoner regardless of the prisoner's legal situation. According to Lines, the principle of equivalence of care does not correspond only to a formal equivalence to health care provided in the community, as prisoners live in worse conditions than free people. States should aim at the equivalence of objectives between the prison and the outside community in terms of healthcare, meaning that the former can be higher than the latter. Rick Lines, 'From equivalence of standards to equivalence of objectives: the entitlement of prisoners to health care standards higher than those outside prisons' (2006), *International Journal of Prison Health Care*, 269 – 280. See also Tomasevski, n.919, at 327. UK courts have recognised the principle of equivalence of care in *R (Brooks) v Secretary of State for Justice* [2008] EWCH 2401.

<sup>920</sup> Before 2006, the Prison Service, particularly the Prison Medical Service had this role. The Prison Medical Service was a separate entity to the NHS. See Marshall and others, n.883.

<sup>921</sup> Creighton and Arnott, n.653, at 198.

<sup>922</sup> *Ibid.* See Prison Rules 1999, Rule 20(1). The duties of doctors are specified in the Department of Health Guidance 2003.

<sup>923</sup> HM Prison and Probation Service, Prison Service Order 3050, para. 2.6.

<sup>924</sup> Interview with Kimberley, prisoner at UK-2 (27 February 2019): "They give you a lot of light [health] support in here, they gave trauma based counselling, I do it once a week throughout the year, and that helps me a lot, I made a lot of progress, you know, and it is like here there are more things tailored to your needs, they give you a lot more freedom than you would in a normal prison, which is a lot good".

Cynthia reminded me how the treatments she received in prison helped her getting clean from drug abuse.<sup>925</sup>

However, others stressed a number of shortcomings in mental health assistance, referring to the lack of funding to ensure necessary treatment.<sup>926</sup>

In Italy, the right to health is protected by the Constitution, which defines health as a fundamental right of the individual and as a collective interest.<sup>927</sup> The right to health links with other constitutional guarantees, mainly the recognition and protection of the inviolable rights of the person,<sup>928</sup> the right to equality and human dignity,<sup>929</sup> and the right to liberty.<sup>930</sup> Thus, it presents a double dimension: it is an individual right, implying that an individual's informed consent and their right to not be cured must be respected; and it has a social dimension, in terms of claiming an individual's right to receive appropriate healthcare treatment when necessary.<sup>931</sup>

The National Health Service (*Servizio Sanitario Nazionale*) operates in penal institutions by respecting the principles of preventive treatment and of guaranteeing prisoners' health and well-being.<sup>932</sup>

However, by transferring the competences concerning prisoners' health to the NHS, there are neither data available on a national scale on their health conditions nor on the results of preventive and informative programmes organised in each penal institution.<sup>933</sup>

### 6.3.1 Health issues affecting the LGBTQ prison population: mental health-related problems

The specific situation of LGBTQ prisoners overlaps with more general problems affecting the prison system regarding prisoners' health, such as the limited access to services, the overall condition of cells and sanitary

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<sup>925</sup> Interview with Cynthia, prisoner at UK-2 (27 February 2019): "I've had more help and sorted my life out since I've come into prison than I did on the out. And on the end I was using. I haven't had for six years now".

<sup>926</sup> Interview with Vera, prisoner at UK-2 (27 February 2019): "It's safer to phone a vet. And ask the vet to see you than see a doctor here. The healthcare here is rubbish. I do think that the house needs to up the game a bit, but then, funding isn't it? There is lot of funding issues, I do think they would get left with mental health in here, the stay for five minutes and that's alright. It's not."

<sup>927</sup> Constitution of the Italian Republic, n.696, Art. 32.

<sup>928</sup> Ibid, Art. 2.

<sup>929</sup> Ibid, Art. 3.

<sup>930</sup> Ibid, Art. 13.

<sup>931</sup> See e.g. Andrea Rovagnati, 'La Pretesa di ricevere prestazioni sanitarie nell'ordinamento costituzionale repubblicano', in Elisa Cavasino, Giovanni Scala, Giuseppe Verde, *I diritti sociali dal riconoscimento alla garanzia. Il ruolo della giurisprudenza* (Napoli, Ed. Scientifica 2013), 147-186; Barbara Pezzini, 'Il Diritto alla Salute: Profili costituzionali' (1983), 1 *Diritti Sociali*, 52 following; Carmela Salazar, *Dal riconoscimento alla garanzia dei diritti sociali* (Torino, Giappichelli 2000).

<sup>932</sup> Italian Law on Prison, n.394, Art. 11 (1) (2). Since 2008 the reform on prison health service has transferred the responsibility regarding prisoners' health care to the National Health Service (*Servizio Sanitario Nazionale*).

<sup>933</sup> Dipartimento di Giurisprudenza - Università degli Studi di Torino and CNCA – Coordinamento Nazionale Comunità di Accoglienza, *I.R.I.D.E.: interventi di Riduzione del Danno Efficaci Secondo le Linee Guida Internazionali 2013*, Final Report.



services, and ultimately the negative impact of overcrowding on inmates' rights and daily life.<sup>934</sup>

Prisoners suffer from mental health problems, including neurotic disorders such as anxiety and depression. Suicide attempts are much more common in prison than among the population outside, particularly in the first weeks or months of imprisonment.<sup>935</sup> For example, between 2015 and 2017, the UK Prison and Probation Ombudsman investigated four deaths by hanging of transgender prisoners;<sup>936</sup> some of the transgender participants in Italy showed clear signs of self-harm, namely scars produced by cutting their wrists.<sup>937</sup>

Various participants described episodes of distress due to isolation and poor prison conditions both in England and in Italy.<sup>938</sup> Roman was glad to be located in a smaller Italian prison with less than 100 inmates, hoping that his request to visit a counsellor would be processed more speedily than in previous penal estates where he was serving his time. Still, mental health issues tend to be considered as less urgent by prison management and staff. Many participants lamented the delays and difficulties in getting psychological support: "I need someone who provides me with the instruments to go into the right direction, go back on track."<sup>939</sup>

Roman's views confirmed that overcrowding remains one of the main issues plaguing penal institutions,<sup>940</sup> as overcrowded penal estates considerably slow down health-care responses and diminish the quality of services.

Being confined can affect negatively individuals' mental stability, as in the case of Alessia, who was involved in a fight with a fellow inmate and consequently sanctioned after the episode:

*"I am not an irascible person, but the anger that mounts on you when you are inside scares me a lot. You do not have the space you need to think. Mentally, going out and work outside is very nice, inside there is a certain malaise".*<sup>941</sup>

As underlined by international bodies<sup>942</sup> and Expert Committees of both countries, the prison system presents numerous deficiencies in relation to health care services. Particularly, there is a lack of service availability for

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<sup>934</sup> See e.g. Associazione Antigone, *Un anno di Carcere xiv rapporto sulle condizioni di detenzione a cura di associazione Antigone*, [<http://www.antigone.it/quattordicesimo-rapporto-sulle-condizioni-di-detenzione/salute-remis/>], accessed 15 July 2019.

<sup>935</sup> Marshall and others, n.883.

<sup>936</sup> Prison and Probation Ombudsman, *Learning lessons bulletin - PPO investigations Transgender Prisoners*, issue 3, 2017.

<sup>937</sup> McNeil and others report that more than half of trans people have self-harmed at some point and more than a third have considered suicide. See Jay McNeil, Louis Bailey, Sonia Ellis, James Morton and Maeve Regan, *Trans Mental Health and Wellbeing Study* (Edinburgh: Scottish Transgender Alliance 2012).

<sup>938</sup> On the exacerbation of transgender prisoners' mental health problems in light of isolation policies, see Carrie L Buist, Emily Lenning and Matthew Ball, 'Queer Criminology', in Walter S DeKeseredy and Molly Dragiewicz eds., *Routledge Handbook of Queer Criminology* (2<sup>nd</sup> ed., Routledge 2018), 96-106.

<sup>939</sup> Interview with Alessia, prisoner at ITA-5 (28 August 2018) (*Ho bisogno che qualcuno mi dia i mezzi per potermi reincanalare nella direzione giusta, di ritornare nei binari*).

<sup>940</sup> As confirmed by the *Torreggiani v Italy* (n.736) judgment.

<sup>941</sup> Interview with Alessia: "Io non sono una persona irascibile. La rabbia che ti esce fuori quando stai qua dentro[...] mi spaventa tanto. Non ho quello spazio che mi serve per poter pensare. A livello mentale. Infatti uscire fuori all'aria, lavorare fuori, è..bello bello. Qui dentro c'è un malessere."

<sup>942</sup> The Yogyakarta Principles state that giving access to medical care, including addressing mental health concerns, to those in custody, is fundamental for prisoners of different SOGIESC. YP, n.152, Principle 9. A general State obligation to adopt legislative and administrative measures to ensure equal access to healthcare facilities, goods and services is stipulated at Principle 17. UN treaty bodies have highlighted the particular vulnerability of minority groups, such as

people with mental health problems.<sup>943</sup> In Italy, a proposal to equalise the importance of physical and psychiatric issues in prison, thus breaking the habit of classifying the latter as less urgent than the former, was not included in the new Law on Prison.<sup>944</sup> The critical conditions of prisoners affected by mental illness have been addressed by the Constitutional Court, which assessed whether the current regime complies with the constitutional rights to health, equality and prisoners' rehabilitation, as well as with Art. 3 ECHR.<sup>945</sup>

Individuals who commit a crime due to mental illness can be required to undertake a therapeutic programme in special residencies dedicated to this scope,<sup>946</sup> but if someone starts suffering from mental illness during imprisonment, no specific arrangement is provided. The Constitutional Court declared this difference in treatment unconstitutional. The Italian system has made it impossible to take a prisoner out of prison to offer them treatment for mental health conditions, thus violating Art. 3 ECHR, the right to human dignity and protection of health.<sup>947</sup>

Since the 2018 Italian reform has not changed the system to properly take care of prisoners affected by mental health,<sup>948</sup> the Court found it necessary to intervene by extending the application of the measure of house arrest "for humanitarian reasons"<sup>949</sup> also to prisoners with diagnosed mental health problems.<sup>950</sup>

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"lesbian, bisexual, intersex and transgender persons" in relation to sexual and reproductive health, and reported that the lack of access to essential resources and medical care is a widespread phenomenon in prisons around the world. Special Rapporteur on Human Rights Defenders, E/CN.4/2005/101, December 13, 2004, par. 46.

<sup>943</sup> See e.g. House of Commons, Health and Social Care Committee, *Prison Health - Twelfth Report of Session 2017–19*, October 2018; Stati Generali dell'esecuzione penale, Documento finale, 18 April 2016, at [[https://www.giustizia.it/giustizia/it/mg\\_2\\_19\\_3.page?jsessionid=RIYCRUEKWZTAKNJvvmzDPZeS?previousPage=mg\\_2\\_19#a4g](https://www.giustizia.it/giustizia/it/mg_2_19_3.page?jsessionid=RIYCRUEKWZTAKNJvvmzDPZeS?previousPage=mg_2_19#a4g)], accessed 16 July 2019.

<sup>944</sup> See Commissione Giostra, n.773; Marco Pellissero, 'Sanità penitenziaria e doppio binario. Alcune puntualizzazioni a margine di "Il reo folle e le modifiche dell'ordinamento penitenziario,"' *Diritto Penale Contemporaneo*, 21 February 2018.

<sup>945</sup> Constitutional Court, sent. 9 January 2019, n. 99.

<sup>946</sup> They are called *REMS* – *residenze per l'esecuzione delle misure di sicurezza* (residencies to enforce security measures).

<sup>947</sup> The Court already stipulated the necessity to protect and fulfil the constitutional right to health for prisoners with sentence n. 111 of 1996. The ECtHR affirmed that in certain cases imprisoning a person with a serious mental illness constitutes a violation of Art. 3 ECHR. See ECtHR, Grand Chamber, *Murray v The Netherlands*, App. No. 10511/10, 26 April 2016, par. 105.

<sup>948</sup> The norms providing for a stay of execution are not applicable to mental illness that do not have negative physical consequences: see e.g. Corte di Cassazione, sent 11 May – 30 August 2016, n. 35826; 28 January - 16 September 2015, n. 37615.

<sup>949</sup> Art. 47 *bis* Italian penal code.

<sup>950</sup> It must be observed that this sentence, along with the shortcoming of the reforming process enacted by the Italian legislator, created a critical scenario for medical practitioners. The President of the Italian Society of Psychiatry, Enrico Zanaldi, has warned that many prisoners who should be treated by the National Health Care are sent to the REMS even when they do not suffer from a mental illness so serious as to require pharmacological treatment. Contextually, prisoners who manifest a maladjustment to prison, or present an antisocial personality disorder are sent to psychiatric services even if these are indeed disorders, and not psychiatric diseases. Other prisoners "dramatise" their disturbances to get out of prison. These statements confirm the critical condition of the prison health care systems, NGOs monitoring prison conditions such as Associazione Antigone affirms, based on Prison Service data and statistics, that there is a shortage in social workers and specialised doctors in the prison system, a lack of tailored rehabilitation programmes that take into account also prisoners' mental health; and an insufficient legal framework. See Antigone, n.364; Pellissero, n.946; Dolcini, n.775; Chiara Daina, *Opg*, "dopo la chiusura troppi falsi pazienti psichiatrici spediti nelle Rems. Diventa alibi per uscire dal carcere," *Il Fatto Quotidiano*, 16 July 2019, at [<https://www.ilfattoquotidiano.it/2019/07/16/opg-dopo-la-chiusura-troppi-falsi-pazienti-psichiatrici-spediti-nelle-rem-s-diventa-alibi-per-uscire-dal-carcere/5323013/>], accessed 16 July 2019.

Therefore, prisoners like Sara, who suffered a personality disorder,<sup>951</sup> should not necessarily spend their sentence at ITA-4. Penal estates could at least provide special sections dedicated to the treatment of mental health. However, after recent legal reforms, the choice to assign prisoners to these sections is assessed by the prison management on a discretionary basis rather than by a judge, thus depending more easily on organisational factors than on prisoners' human right to health.<sup>952</sup>

The question is whether transgender prisoners committing self-harm and suffering from serious health repercussions due to isolation and lack of continuity in medical treatment during their transitioning process in prison could meet the conditions to be eligible for an alternative measure to imprisonment, at the same time without considering gender identity as a pathology *tout court*. On a similar note, the stigma suffered by some homosexual – or more generally queer – prisoners could be potentially interpreted as a form of inhuman or degrading treatment that justifies a judicial review of their sentence.

### 6.3.1.a Drug and alcohol abuse

Data report that numerous prisoners are heavy alcohol users or dependent on drugs, and a minority of prisoners continue using drugs while in prison.<sup>953</sup>

This topic did not come up often in interviews with participants. However, Cynthia firmly believed that “drugs are the problem” in the prison she lived in, as they “cause a lot of bullying, a lot of problems in relationships and a lot of debts.”<sup>954</sup> The correlation between drug use in prison and increase of violent behaviour and self-harm is indeed evidenced by official governmental reports.<sup>955</sup> Drugs circulation in prison was similarly mentioned by an Italian female participant, highlighting how people consuming drugs can disrupt the life of other prisoners.<sup>956</sup>

Cynthia continued explaining that drug abuse affects also prisoners' requests for medicines, as prison staff are not sure whether they are submitted to address actual health problems, or if they will be used to get intoxicated.<sup>957</sup> Indirectly, it also suggests that the prison management struggles to ensure periodic medical

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<sup>951</sup> This was told to me informally by a social worker at ITA-4 prison, but I was not allowed to check her clinical records for confirmation. At a certain point during the interview, Sara asked me to use female pronouns and to call her with her female name, but she initially introduced herself to me as Michele and referred to herself as a man.

<sup>952</sup> Constitutional Court, sent. 99/2019, n.947.

<sup>953</sup> Marshall and others, n.883. Data from the Italian Prison Service outline that on December 2015, 17.676 convicted persons out of 52.164 were imprisoned for violating law on drugs 309/90, as the only crime or among the crimes for which they were condemned. See data from the Prison and Probation Ombudsman annual report 2017-2018; Stati Generali, n.759.

<sup>954</sup> Interview with Cynthia, prisoner at UK-2 (27 February 2019).

<sup>955</sup> House of Commons, n.945.

<sup>956</sup> Interview with Fiona, prisoner at ITA-5 (27 August 2018): “in cells it is like hell between drugs that enter the prison and people who fight with each other” (*nei camerotti sta succedendo l'ira di Dio fra droghe che sta a entrà, fra chi se sta a menà*).

<sup>957</sup> Interview with Cynthia, prisoner at UK-2 (27 February 2019): “Right take today for instance, I've got my back hurting, I've been asked medications and to put in for physio. They think I was asking for heroine.”

screenings for prisoners.

On the other hand, the prison experience represented an opportunity for some of my participants to initiate a drug dependency programme: “Prison has changed me in the sense that I detoxified and I became more aware of reality.”<sup>958</sup>

The overlapping of illicit drugs consumption and denial of necessary medications can lead to the growth of a market for prescription medications inside prison, which in turn can result in prisoners becoming the target of bullying to obtain medicines.<sup>959</sup>

In both jurisdictions, monitoring bodies call for prison authorities to collect more accurate data to understand these phenomena and to improve the efficiency of internal policies. They further recommend that the Legislature and the Executive enhance alternative measures to imprisonment and special protocols to adjudicate people condemned for drugs-related crimes, in cases where dependency is a major factor that determined the gravity of the punishable conduct.<sup>960</sup>

#### 6.3.1.b Sexual health policies

The spread of HIV and STDs is a worrisome reality inside prison, aggravated by sex prohibition policies enforced in both jurisdictions, which prevent sexual contacts from becoming visible and consequently introducing official sexual health measures. The CoE asks States parties to put in place adequate prophylactic measures to prevent sexually transmitted infections, while condemning total isolation of patients in case of infection.<sup>961</sup>

In England, there is no common policy on the distribution of condoms in prison, but doctors can distribute them if they think there is a risk of HIV infection.<sup>962</sup>

In *R v Home Secretary ex p Fielding*, a homosexual applicant who claimed that limiting the distribution of condoms only to cases where medical staff believed a potential health risk existed was irrational, as a similar request would obviously imply that the prisoner intended to engage in unsafe sexual activity, therefore “clinical judgment was irrelevant”. The Court sustained a different interpretation and confirmed the lawfulness of the policy, observing that the Prison Service was legitimately concerned that homosexual activity should not be

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<sup>958</sup> Interview with Teresa, prisoner at ITA-3 (7 August 2018) (*il carcere ha cambiato il fatto che io mi sono disintossicata e quindi sono diventata più consapevole della realtà*). Programmes and educational initiatives to combat drug addiction represent an example of preventive healthcare to address a critical problem of prison estates. Preventive health care services are defined as practices that go beyond the treatment of individual illness or disease to maintain prisoners’ health. See e.g. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: 9<sup>th</sup> General Report on the CPT’s activities covering the period 1 January to 31 December 1998, CPT/Inf (1999) 12 (30 August 1999), par. 41.

<sup>959</sup> House of Commons, n.945.

<sup>960</sup> See Stati Generali, n.759; House of Commons, n.945.

<sup>961</sup> Council of Europe: Committee of Ministers, Recommendation CM (98) 7 of the Committee of Ministers to member states concerning the ethical and organisational aspects of health care in prison, 8 April 1998.

<sup>962</sup> Marshall and others, n.883, at 205.

encouraged; additionally, the Court deemed that condoms could be used for other purposes rather than sex. Nevertheless, they should be distributed by the medical staff to homosexual prisoners at any time doctors were satisfied that the request is genuine and the subject involved would otherwise engage in unsafe sex.<sup>963</sup> The decision appears to adopt a convoluted interpretation to avoid admitting that prohibiting sexual activity in prison in any circumstances is unrealistic, ultimately reiterating a “don’t ask don’t tell approach” to sexuality which determines serious risks in terms of health in case the medical staff decided discretionally to deny the requests for condoms.<sup>964</sup>

Participants at UK-1 confirmed that condoms were available upon request, but it “would be more for the jail gay”, whereas sexual activity would not necessarily take place in the VPU.<sup>965</sup>

In Italy, laws and policies do not officially include provisions consenting to the distribution of condoms, or other HIV prevention policies (e.g. distribution of sterile syringes).<sup>966</sup> Accounts from Italian participants hosted at ITA-3 and ITA-4 confirmed that neither penal estates provided condoms. Participants stressed how sexual activity would take place anyway, regardless of risks of infection; nonetheless, they mentioned that some social workers, healthcare professionals and members of staff were more understanding towards inmates’ needs, so informal arrangements could be agreed.

A study conducted by the University of Turin among prison officers and healthcare practitioners confirms these findings and show that prison management and staff resist introducing condom distribution programmes, due to cultural barriers that prevent opening up to the fact that regulating sexuality through chastity is irrational and unrealistic.<sup>967</sup> Data from the report also concerned ITA-5 prison, where external NGOs have organised workshops to deliver information concerning HIV and STD-prevention to a limited number of prisoners and staff (nine professionals). Internal continuative seminars on risk prevention in this area seemed however to be lacking.<sup>968</sup>

Besides the serious health implications of an indeterminate legal framework that prohibits sexual activity, the lack of clear guidance in sexual health policies violates the minimum standards recommended by international bodies.<sup>969</sup> Leaving such decisions to doctors’ discretion contributes to dehumanising prisoners, who are not entitled to exercise their right to sexuality.

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<sup>963</sup> *R v Secretary of State for the Home Department Ex p. Fielding*, [1999] Prison L.R. 65, 5 July 1999.

<sup>964</sup> It is a noteworthy example of the consequences of the sex negativity paradigm characterising the prison environment. On the concept of sex negativity, see Rubin, n.17.

<sup>965</sup> Interview with William, prisoner at UK-1 (28 November 2018); Simon also confirmed William’s account.

<sup>966</sup> Law 135/1990 stipulates that people deprived of their liberty cannot be subjected to analysis aims at ascertaining HIV infection without consent. It is possible to conduct epidemiological analysis to determine the presence of HIV only if samples for analysis are duly anonymised to protect prisoners’ confidentiality. See Law 5 June 1990, n. 135 (Official Gazette n. 132, 8 June 1990) (*Programma di interventi urgenti per la prevenzione e la lotta contro l'AIDS*).

<sup>967</sup> Dipartimento di Giurisprudenza – Università degli Studi di Torino and CNCA – Coordinamento Nazionale Comunità di Accoglienza, *I.R.I.D.E.: interventi di Riduzione del Danno Efficaci Secondo le Linee Guida Internazionali 2013*, Final Report.

<sup>968</sup> Ibid.

<sup>969</sup> The Yogyakarta Principles stipulate that States shall “Provide adequate access to medical care and counselling appropriate to the needs of those in custody, recognising any particular needs of persons on the basis of their sexual

### 6.3.1.c The health care of transgender prisoners

The treatment of transgender prisoners deserves a specific analysis. Indeed, the discourse around transgender people has been framed prominently in terms of psychophysical well-being, with focus on the medical implications of identifying with a gender different to the biological sex assigned at birth.<sup>970</sup>

In England, the GRA 2004 regulates how a person can obtain a Gender Recognition Certificate that recognises the “acquired gender” for all purposes.<sup>971</sup> Health-related considerations are an integral part of the legal procedure, which consists of submitting an application before a Gender Recognition Panel.<sup>972</sup> Indeed, the Panel includes both legal members and medical members, who must be either a medical practitioner or a registered psychologist.<sup>973</sup> Hearings are not foreseen unless the panel considers it necessary, and reasons for the decision must be communicated to the applicant.<sup>974</sup>

The Act does not provide any obligations to undergo gender confirmation surgery or hormone treatment; still, the procedure presents aspects of pathologisation of gender identity by prescribing the heavy involvement of medical practitioners, and the submission of medical evidence.

Although the NHS recognises hormonal treatment or surgical change of sex characteristics as a clinical need, in some circumstances it can refuse to fund similar procedures when they are considered superfluous.<sup>975</sup>

Besides medical requirements, the “real life test” can be a difficult condition to comply with for transgender prisoners.<sup>976</sup> As seen in *R (on the application of AB) v Secretary of State for Justice, The Governor of HMP Manchester*,<sup>977</sup> the High Court found a violation of Art. 8 ECHR in the Secretary of State’s decision to continue detaining a transgender prisoner MTF in a male prison, as it constituted a serious interference with the prisoner’s personal autonomy. In the judgment, one relevant factor assessed regarded the Gender Identity

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orientation or gender identity, including with regard to reproductive health, access to HIV/AIDS information and therapy and access to hormonal or other therapy as well as to gender-reassignment treatments where desired.” The European Committee against Torture recommended the introduction of preventive health care measures, such as programmes and educational initiatives to combat drug addiction. See e.g. [CPT/Inf (1999) 12] par. 41.

<sup>970</sup> In this sense, see Anna Lorenzetti, *Diritti in transito. La condizione giuridica delle persone transessuali* (Franco Angeli ed. 2014). In commenting on the UK GRA back in 2009, Sharpe praises the piece of legislation as particularly progressive – even “beyond expectations” – as compared to other countries at the time, precisely as it did not include “the more onerous medico-legal conditions governing legal recognition in other jurisdictions”, with focus on the lack of surgical intervention as mandatory requirement to obtain legal gender recognition. See Sharpe, n.872, at 241-245.

<sup>971</sup> Stephen Gilmore, ‘The Legal Status of Transsexual and Transgender Persons in England and Wales’, in Jens M. Sherpe ed., *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015), 191. Gilmore observes that the expression “acquired gender” has been highly criticised, as it does not acknowledge that a transgender person’s inner gender identity represents their true self, and the process of gender recognition does not create a new gender.

<sup>972</sup> The Panel is part of HM Courts and Tribunal Services.

<sup>973</sup> GRA 2004, n.872, Sch. 1 para. 1

<sup>974</sup> Ibid, S. 8(4). The applicant can appeal to the High Court against a rejection, but if rejected, another application cannot be made before six months from the date of rejection.

<sup>975</sup> Gilmore, n.973, at 195.

<sup>976</sup> The real life test corresponds to the condition that a transgender person “has lived in the acquired gender throughout the period of two years ending with the date on which the application is made” (GRA 2004, n.872, S. 2 (1)(b)).

<sup>977</sup> [2009] EWHC 2220 (Admin), n.881.

Clinic's refusal to consent to allowing the applicant's surgery unless she had spent two years living in her preferred gender in a women prison. The gender binary division of prison, along with the strict evidentiary requirements transgender prisoners have to satisfy to prove their intention to live in their preferred gender, can have serious implications in relation to their health.

Mental health support and delivery of proper information concerning the steps to complete the transitioning process are essential to transgender prisoners' well-being. Transgender participants' experiences vary on this point. Kimberley affirmed that "you got counselling, and your supervisor come and see you after to make sure you are all right".<sup>978</sup> Robert, a transgender person MTF held at UK-1 came out as trans after admission into prison, but he was still waiting for a psychiatric consultation two months after his induction.<sup>979</sup> The difficulty in accessing counselling or more general mental health support was denounced also by Drew, who at the time of the interview was waiting for his specialist consultation after an initial appointment with a general practitioner. Psychological consultation represents a necessary step to obtain the legal recognition of gender identity and to be authorised to carry on with the hormone treatment. From interviewees' accounts, it emerges that the quality of care can vary considerably depending on factors such as the hosting prison's policies, the prisoner's supervisor, and the priority attached to each request.

According to participants, the use of hormones was overall regularly guaranteed, even for those who started transitioning in prison, which constitutes a fundamental factor to prevent transgender prisoners' self-harm.<sup>980</sup>

Yet, starting surgery is a much more complicated scenario. Delays in accessing medical and psychiatric consultations and obstacles in getting the relevant information from prison staff makes having surgery incredibly hard:

*"I am in the process of transitioning from female to male, it takes a long time. I had an appointment with a doctor, but nothing happened after that. For me, it feels like a grey area, as I am still waiting for a consultation, there has been a lot of debate since I have been in here when I consider getting information and when I can go for what. They gave me the wrong information about how long it takes to transition, they wouldn't tell me about a lot of different things."*<sup>981</sup>

Consequently, trans inmates' permanence in prison becomes considerably more frustrating and painful, particularly when the staff are not trained to give appropriate information or to signpost social workers or more

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<sup>978</sup> Interview with Kimberley, prisoner at UK-2 (27 February 2019).

<sup>979</sup> Interview with Robert, prisoner at UK-1 (28 November 2018). I am using a male pseudonym and male pronouns as at the time of the interview he preferred to be addressed in this way.

<sup>980</sup> Interview with Kimberley, prisoner at UK-2 (27 February 2019): "I am on hormone treatment. I have been on hormone treatment since November 2017, and I have been on that since 2017. It helps me a lot it is actually...I have not self-harmed, since 2016, so I have done really well, it relaxes me a lot."

<sup>981</sup> Interview with Drew, prisoner at UK-2 (27 February 2019). Kimberley details the struggles she was facing to be authorised to undergo surgery: "trying to get the assessment done for surgery here in the prison it is like a deadlock, it is like everything it's like to try to get to see the specialist to do the assessment and to go back and get the assessment done it's like mad, it's like the Commission doesn't understand the delay they cause, the stress they cause on top of that to the individual. That means to be looked at, and cos it caused anxiety and everything."

experienced members of staff: “people do self-harm over their issues, people do feel like they can cope and get out from that spot they are in”.<sup>982</sup>

The Italian legislator attaches great meaning to the preliminary stages of modifications of sex characteristics as a fundamental aspect of the transitioning process.<sup>983</sup> This is reflected in the Italian Law on Prison, which states that convicted prisoners or detainees in pre-trial detention who are undertaking a therapeutic programme to change their sex characteristics should be guaranteed the continuation of such therapy, and be assisted with the necessary psychological support.<sup>984</sup>

The law seems to assume that all transgender people wish to change their sex characteristics and explicitly addresses only the case of transgender people who have already started this process.

However, prisons host people at different transitional stages (prisoners who identify as transgender, but did not start the transitioning process; prisoners who are transitioning at admission; prisoners who are waiting for surgery to complete their transition), as well as people who identify as non-binary, gender non-conforming or gender queer, but have no intention to undergo a medical procedure.<sup>985</sup>

Participants highlighted their struggles in initiating or continuing their transitioning process. Problems arose in terms of accessing psychological support, paying for hormone cures, or obtaining information about medical treatments. Surgery in particular appeared to be a chimera for transgender prisoners.

This situation reflects the way legal recognition of gender identity is regulated in the country. The recognition of the transgender subject developed from the establishment of the right to sexual identity as an inherent personal right connected to the right to health.<sup>986</sup> Law 164 of 1982 on correction of attribution of sex<sup>987</sup> aims to focus on the subjective dimension of health, interpreting (sexual) health extensively to ensure the individual’s psychophysical well-being; contextually, it embraces a medicalisation of transsexualism, in line with the classification of gender identity as gender identity disorder made at the time in diagnostic manuals.<sup>988</sup>

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<sup>982</sup> Interview with Drew, prisoner at UK-2 (27 February 2019).

<sup>983</sup> Lorenzetti, n.972.

<sup>984</sup> Law on Prison, n.394, Art. 11 (10).

<sup>985</sup> See e.g. Lorenzetti, n.91. Placement in special section and the lack of specific induction procedures capturing the presence of prisoners belonging to minority groups or presenting one or more protected characteristics entails relevant implications also in terms of respect of LGBTQ prisoners’ privacy, professional confidentiality, data protection, and of the trust relationship between doctor and patient. See Sandro Libianchi, ‘La medicina penitenziaria e la riforma della tutela della salute in carcere: il D.P.C.M. 1 aprile 2008’ (2008), 1 *Antigone*, 115-140, at 139.

<sup>986</sup> Barbara Pezzini, ‘Transgenere in Italia: le regole del dualismo di genere e l’uguaglianza’, in Gina Vidal Marcilio Pompeu, Fernando Facury Scaff (org.), *Discriminação Por Orientação Sexual - A Homossexualidade e a Transexualidade Diante da Experiência Constitucional* (Florianapolis/SC, Brazil, Conceito Editorial 2012).

<sup>987</sup> Law 164/1982, n.839. Italy was the third European country, after Sweden in 1972 and Germany in 1980 to introduce provision to legally recognise gender identity. See Lorenzetti, n.972. Before 1982, gender confirmation surgery was prohibited in Italy, and the law mirrored the normative characterisation of sex as immutable and of body as inviolable. See Maria Giovanna Cubeddu Wiedemann, ‘The Legal Status of Transsexual and Transgender Persons in Italy’, in Jens M. Sherpe ed, *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015), 250.

<sup>988</sup> See Pezzini, n.988; American Psychiatric Association, *Gender Dysphoria* (DSM-5 Collection 2013). Gender Identity Disorder has been replaced with a Gender dysphoria diagnosis in the fifth edition of the manual. Gender dysphoria is defined as a conflict between a person's physical or assigned gender and the gender with which he/she/they identify. People with gender dysphoria may be very uncomfortable with the gender they were assigned, sometimes described as



Law 164 is composed of very few articles and does not explicitly regulate the status of transsexual and transgender persons, but simply illustrates the conditions to satisfy for having gender identity legally recognised.<sup>989</sup>

It establishes that the correction of attribution of sex shall be decided by the judge with a sentence on the assumption that the claimant had already completed surgery abroad. In the negative, the law provides for a two-tier proceedings where the judge first assesses whether surgery is necessary; if so, after the authorised surgery is concluded, the judge orders the Official Registry to change the personal information on gender in official documents.<sup>990</sup>

The sketchy formulation of the law<sup>991</sup> led to integrating the legal framework with *soft law* instruments, such as the guidelines of the National Observatory on Gender Identity,<sup>992</sup> while leaving a wide discretion to the courts in assessing the evidentiary requirements, investing the judiciary with very sensitive medical evaluations.<sup>993</sup> However, it remains unclear what exact requirements should be met to be entitled to legal gender recognition.

The lack of details affects prisoners' access to information regarding the procedure. The practical steps developed through time and became a consolidated procedure which can be difficult to grasp for convicted transgender persons. "It depends on the penal institution and on the region where your prison is located" Teresa told me. "I wish I could start therapy sessions here in prison, I have asked the social workers but they could not answer me" said Andrea.<sup>994</sup>

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being uncomfortable with their body (particularly developments during puberty) or being uncomfortable with the expected roles of their assigned gender. Until recently, the World Health Organization (WHO) also included transsexualism among behavioural and mental disorders. These guidelines are integrated in national medical classifications and shall thus be taken into account in light of the considerable influence they have on the lives of LGBTQ people.

<sup>989</sup> Cubeddu Wiedemann, n.989, at 249-250.

<sup>990</sup> L. 164/1982, n.839, Art. 1 and 3. The law has been recently reviewed and modified in 2011, with the aim of simplifying the procedure. In reality, according to Lorenzetti the reform obtained the opposite effect. By introducing a different type of civil procedure to evaluate the request of legal gender recognition (ordinary procedure instead of summary judgment) in case the judge must decide on the necessity of surgery, the time and costs of the proceedings increased, which can be problematic for transgender applicants. Lorenzetti, n.972.

<sup>991</sup> The lack of detail in the legal text, along with the absence of any reference to the term "transsexual" depends on the fact that the Members of Parliament debating the bill at the time wanted to avoid any possible opposition from public opinion in light of the sensitive nature of the topic. An approach based on avoiding any explicit reference in *the travaux préparatoires* to the law is described by Alvaro Marchiori, Nicola Coco, *Il transessuale e la norma* (Padova Cedam 1986), 89 and following.

<sup>992</sup> ONIG (*Osservatorio Nazionale sull'Identità di Genere*) is an association that gathers professionals and experts on gender identity, whose scope is to deepen the scientific and social knowledge on transgenderism and transsexualism, promoting opening up culture towards freedom of expression for transgender and transsexual people. See [www.onig.it], accessed 2 March 2020.

<sup>993</sup> Lorenzetti, n.972.

<sup>994</sup> Interview with Teresa, prisoner at ITA-3 (7 August 2018) (*Sì, dipende dall'istituto e dalla regione*); interview with Andrea, prisoner at ITA-5 (28 August 2018) (*Magari potessi iniziare le sedute psicologiche in prigione, è quello che io ho chiesto agli assistenti ma non mi hanno saputo rispondere*).

It is also unclear how long this process would take, with some participants talking of months of counselling, whereas others like Silvia said she needed three years of therapy to “become a woman.”<sup>995</sup>

The prison organisation reflects the lack of precise paths existing outside, replicating power dynamics fuelled by uncertain legal criteria.

In general, the transitioning process starts with preliminary meetings, where information is given and the transgender person gives their informed consent to the process.

If all conditions are met, namely the absence of psychological or other serious issues, the applicant starts a programme of psychological and medical support through hormone dosing.<sup>996</sup> This stage usually lasts between four and six months.

Subsequently, a transgender person must pass “the real life test,” which represents a core phase of the transitioning process. The person is required to live in accordance to their preferred gender. This stage should last between eight and 12 months, but it can go on even for years, precisely because of the lack of specific legal provisions detailing these requirements.

Once these preliminary parameters are met, a subject who is willing to officially change their gender can submit their request before the judge. Due to the not clearly specified evidentiary requirements, medical practitioners and the judiciary can potentially prolong this process for years. The judge, who should limit themselves to ascertaining the legitimacy of medical evidence, has instead the power to decide on circumstances that should pertain to the scientific realm.<sup>997</sup>

Once the court-authorised medical treatment is completed, the applicant shall submit another application for the Court to allow amendments to the Civil Registry.<sup>998</sup>

It is hard for prisoners to comply with these requirements. Elena observes that it is possible to start medical treatments during imprisonment, but “the hardest part is to truly convince people of your sexual identity”.<sup>999</sup>

Participants have stated that accessing counselling is quite complicated, and months can pass before an application for a psychological visit is processed.<sup>1000</sup> In order to initiate hormone treatments in prison, it is

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<sup>995</sup> Interview with Silvia, prisoner at ITA-3 (7 August 2018): “I have two years left to take the next step, the psychologist takes three years because I want to become a woman” (*mi mancano due anni per fare il passo successivo, sono tre anni di psicologo perché voglio diventare una donna*).

<sup>996</sup> In terms of age, Italy’s Basic Law provides that the legal recognition of gender is permitted for people over 18 years of age, who have sufficient mental and intellectual capability to act. See Fausto Caggia, *Atti di disposizione del corpo, Persona, Famiglia e Successioni* (Cuffaro ed. IPSOA 2006), at 171.

<sup>997</sup> Lorenzetti, n.972.

<sup>998</sup> Law 164/1982, n.839.

<sup>999</sup> Interview with Elena, prisoner at ITA-3 (7 August 2018) (*Sì, è una cosa possibile cominciare le cure in istituto, però devi convincere realmente le persone di quella che è la tua sessualità*).

<sup>1000</sup> Interview with Alessia, prisoner at ITA-5 (28 August 2018): “there are people who have been here for one year and a half and still don’t have a psychologist” (*C’è gente che sta qua da un anno e mezzo e non ha ancora uno psicologo*). Interview with Sara; “I never talked to a psychologist here in prison, honestly, but I should do it” (*Ma io non ho mai parlato sinceramente con uno psicologo qui in istituto. Bisognerebbe parlarci*). Interview with Andrea, prisoner at ITA-5 (28 August 2018): “I really would like to start therapy sessions here, I asked it to prison staff but they were not able to

necessary to pass a psychological and endocrinological evaluation. Even in this case, transgender prisoners' requests can take months to be processed.

Silvia, for instance, did not obtain the authorisation to take hormones: "I don't know why, perhaps because I'm a foreigner."<sup>1001</sup> She referred to a several month-long waiting period, even though she already attended two medical visits at an external hospital.

This uncertainty confirms how critical it is to rely on a legal framework that establishes precise temporal limits and medical thresholds for a transgender person to have a clear picture of the process to undergo for completing their transitioning process.

Moreover, since the law does not ensure equality of health care treatment,<sup>1002</sup> it is more complicated to initiate a hormone therapy inside prison if a transgender person did not already start the treatment outside.

Economic and practical implications of these proceedings can also represent an obstacle for many transgender people, particularly in prison.<sup>1003</sup>

Public clinics where it is possible to undergo surgery are in limited number across the country.<sup>1004</sup> Participants at ITA-3 mentioned medical appointments they attended at specialised Centres in a city close-by, but inmates living in prisons from other places across the country may not have the same opportunity, considering the logistic implications of organising a transfer outside prison.

Hormone treatments can be very expensive, as well. Participants had to use almost all their allowance to cover the costs for the medicines. Elena noticed that some of these drugs used to be deductible from taxes as they can be registered as necessary health costs. Since 2018, a change in the law eliminated this option.<sup>1005</sup>

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answer me". (*Magari potessi iniziare le sedute psicologiche in prigione, è quello che io ho chiesto agli assistenti ma non mi hanno saputo rispondere*).

<sup>1001</sup> Interview with Silvia, prisoner at ITA-3 (7 August 2018) (*Non so perchè, forse perchè sono straniera*).

<sup>1002</sup> Interview with Teresa, prisoner at ITA-3 (7 August 2018): "I see the law as a problem, as if I would have come from the rehab communities already taking hormones I would have had to interrupt the cure, and it would have constituted a huge problem" (*Vedo la legge nda come un problema perché se io arrivavo dalla comunità, e se io non fossi arrivata dalla comunità già con gli ormoni che prendevo avrei dovuto interromperli, quindi sarebbe stato un grosso problema*).

<sup>1003</sup> In practice, for many transgender applicants outside it would be too expensive to submit two applications. Consequently, they often avoid making a first application regarding authorised medical interventions and they simply apply for recognition after having already submitted to treatment, although the law formally calls applicants to respect both stages of the procedure. Cubeddu Wiedemann, n.989, at 254.

<sup>1004</sup> Public centres can be found at Bari Polyclinic (Policlinico of Bari), at the University of Naples – Polyclinic Department of Neuro-Sciences; San Camillo Hospital in Rome; Sant'Orsola Malpighi in Bologna; Molinette hospital in Turin; Niguarda Hospital in Milan; Cattinara Hospital in Trieste. Participants at Ivrea talked of a Centre for Gender Identity Disorder (Ci.Di.Gem.) at Turin Hospital.

<sup>1005</sup> Participants report that certain drugs can cost between 30 and 50 euros for just one box; Elena cites a medicine to reduce testosterone which is especially expensive. The reason for this depends on the fact that medicines for hormone treatment could be obtained as part of a Therapeutic Plan to cure a gender dysphoria diagnosis. However, such diagnosis is not officially recognised, as neither the Ministry of Health nor regional bodies have introduced specific Protocols to this aim. Therefore, these drugs are not tax-deductible. The situation regarding hormone treatment is particularly problematic in Italy. In 2019, it emerged that transgender men had to face a serious pharmaceutical emergency, as some fundamental testosterone-based medicines for hormonal therapy were not available on the market anymore. The situation has been denounced by activists, and was made the object of a Parliamentary Question to the Government issued by Rossella Muroli MoP. See *Salute, Civati-Muroli: Discriminazione su Reperibilità Farmaci Trans, Depositata Interrogazione*, Redazione Possibile, 12 March 2019, at [<https://www.possibile.com/salute-civati-muroli->

Interrupting hormone treatment can of course cause serious health issues, which are aggravated if access to health care has many flaws and transgender people suffer from isolation and transphobic behaviour from staff and other prisoners.

Regarding surgery to change primary sex characteristics, such as genitalia, the Inland Revenue Agency (*Agenzia delle Entrate*) clarified that the pertaining costs are tax-deductible as this medical procedure constitutes an essential health service rather than a form of cosmetic surgery; still, participants like Elena pointed out that only some medical centres ensure free surgery.<sup>1006</sup>

However, prisoners rarely have the opportunity to complete surgery in prison, not only in light of the lengthy process to meet all the legislative requirements, but also because prison social workers tend to dissuade inmates from undertaking it during their sentence. They highlight the necessity to live a good-quality life in a stable environment to complete it successfully, which is a testament to the incapability of the prison system to ensure minimum standards of care.<sup>1007</sup>

Nationality represents another considerable obstacle for transgender inmates. A high percentage of the transgender prison population comes from foreign countries. The 1982 law remains silent on the issue; however, case law shows that the legal recognition of gender identity is available only to those listed on the national population registry. In 2000, an Italian Tribunal established that applicants who can demonstrate they are legal residents can have their gender identity recognised.<sup>1008</sup> Nevertheless, gender recognition is possible only on documents issued by Italian authorities. Considering that many prisoners are irregular immigrants, this is a significant barrier for transgender immigrants, which contributes to increase the gap between Italian or legal residents, and non-residents among transgender inmates.

On a more positive note, the Italian Constitutional Court and the Italian Supreme Court followed the jurisprudence of the ECtHR<sup>1009</sup> and established that sterilisation and medical intervention are not necessary pre-conditions to obtain legal gender recognition.<sup>1010</sup>

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discriminazione-su-reperibilita-farmaci-trans-depositata-interrogazione/], accessed 14 July 2019. It seems that the medicine in question – Testoviron – will be commercialised again starting from September 2019. Other drugs – such as Nebid, Sustanon, Testogel e Testoviron – are also very difficult to find, and production of some of them suffers from temporary suspension on behalf of pharmaceutical companies. See *SOS Testosterone, quello che non tutti sanno sulla TOS*, Io Sono Minoranza, 28 febbraio 2019, at [https://iosonominoranza.it/sos-testosterone-quello-che-non-tutti-sanno-sulla-tos/], accessed 14 July 2019.

<sup>1006</sup> Agenzia delle Entrate, *Interpello art. 11, legge 27 luglio 2000, n. 212 - Disturbo di identità di genere - Trattamento medico chirurgico - Detraibilità della spesa - Art. 15, comma 1, lett. c), del TUIR*, 3 August 2015.

<sup>1007</sup> Edney, n.270; Whittle (2002), n.16.

<sup>1008</sup> Cubeddu Wiedeman, n.989, at 252.

<sup>1009</sup> *A.P., Garçon and Nicot v. France*, n.595; *Y.Y. v Turkey*, n.595.

<sup>1010</sup> Corte di Cassazione, decision n. 15138, 20 July 2015; Constitutional Court, sent. 21 October 2015, n. 221. The Constitutional Court affirmed that gender identity is a part of a person's identity, to be interpreted not only in terms of sex characteristics, but also in its social meaning. Therefore, considering that law 164 does not specify which treatment a person should undertake, and that surgery is only one of the many available options, compulsory sterilisation or surgery would violate the constitutional right to identity, equality and health under the Constitution.

In spite of the Higher Courts interpretation leading closer to a notion of gender identity based on self-determination,<sup>1011</sup> the whole procedure remains heavily medicalised. In particular, the “real life” test seems to imply that medical treatments of some kind should be completed, thus making it harder for gender queer, non-binary or gender non-conforming individuals to change their legal gender. The process adheres to the normative paradigm based on the inherent belief that the individuals’ felt gender identity should match with their physical appearance, aligning with societal ideas of the “feminine” and the “masculine” body. The law *de facto* conflates sex and gender,<sup>1012</sup> excluding plural orientations and fluid identities.<sup>1013</sup>

## 6.4 Prison life as LGBTQ people: rehabilitation programmes

This section will explore LGBTQ inmates’ access to activities and services offered by prison; vulnerability factors that affect their lives during imprisonment; and the emergence of relationships among LGBTQ people in prison, and the consequences they may have on their sentence.

Participants have repeatedly described the different passing of time in prison as compared to the outside world, and the frustration or boredom characterising prison life.

In this regard, for imprisonment to truly enact the rehabilitative aim which is theoretically at the basis of international and national prison policies, it is fundamental that each prison promotes activities and programmes that can truly support prisoners, allow them to acquire skills useful to their re-integration in society post-release,<sup>1014</sup> while contextually acknowledging their differences, including in terms of gender and sexuality.

UK Prison Rules stipulate that prisoners shall be given the opportunity to participate in physical education for at least one hour a week, and they should profit from the education facilities provided at their prison. Inmates are also required to do useful work for no more than 10 hours a day, and should be remunerated for their work.<sup>1015</sup>

Italian legislation includes similar provisions in this area. Penal estates should provide appropriate instruments for prisoners to participate in work activities, education and professional learning, recreational and cultural activities, as well as any other group activities, including a library service.<sup>1016</sup>

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<sup>1011</sup> See Corte di Cassazione, id.

<sup>1012</sup> Valdes, n.32; Whittle (2006), n.16.

<sup>1013</sup> Butler, n.32; Ahmed, n.29.

<sup>1014</sup> Data show that the literacy and numerical skills of prisoners are far below those of the general population, a factor that seems to confirm the class and economic disparity which are often the root causes of criminal behaviour. Johnny Lear, ‘Prisoners’ literacy and numeracy levels’, Electronic Platform for Adult Learning in Europe, 29/01/2016, at [<https://epale.ec.europa.eu/en/blog/prisoners-literacy-and-numeracy-levels>], accessed 29 December 2019.

<sup>1015</sup> Prison Rules 1999, Rule 29, 31 and 32.

<sup>1016</sup> Italian Law on Prison, n.394, Art. 12: “In penal institutions, according to rehabilitation needs, instruments are available to undertake work, scholarly and professional education, recreational activities, cultural activities and every other communal activity. Institutes shall be equipped with a library with books and magazines, to be selected by a commission

In practice, the implementation of these principles can vary considerably depending on each prison administration.

Indeed, participants who had the possibility to exercise at the gym,<sup>1017</sup> or to attend education programmes and pass their exams,<sup>1018</sup> reported a better ability to be more resilient about daily life than inmates hosted in penal estates where courses or services are not available.

Separation policies end up blocking LGBTQ prisoners from accessing activities. Transgender inmates at ITA-3 reported that male prisoners were offered more activities, including social and recreational ones, while transgender people did not have the same opportunities. In general, transgender women had very limited chances to attend rehabilitation programmes. Besides constituting a form of direct discrimination, this phenomenon reiterates the negative consequences of a blanket policy assigning transgender people to the prison corresponding to their biological gender, yet keeping them separate from the general population.<sup>1019</sup> In contrast, participants who spent a part of their sentence at Sollicciano female prison in Florence reported that they could attend activities together with female prisoners, including open-air sports such as volleyball, while the staff were overall less concerned that sex-related contacts could take place, thus allowing prisoners of all genders to share common areas.<sup>1020</sup> Paradoxically, the prison officers' assumption that transgender women cannot but be heterosexual, or that lesbian implies a desire for ciswomen only, becomes eventually an advantage for transgender minorities in relation to their right to relate.<sup>1021</sup>

Even if the treatment reserved to transgender prisoners at ITA-3 does not legally amount to solitary confinement,<sup>1022</sup> trans inmates are substantially deprived of essential services to guarantee their rehabilitation,

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as provided by Art. 16 (2). Detainees and convicted prisoners' representatives participate to the management of the library services" (*Negli istituti penitenziari, secondo le esigenze del trattamento, sono approntate attrezzature per lo svolgimento di attività lavorative, di istruzione scolastica e professionale, ricreative, culturali e di ogni altra attività in comune. Gli istituti devono inoltre essere forniti di una biblioteca costituita da libri e periodici, scelti dalla commissione prevista dal secondo comma dell'art. 16. Alla gestione del servizio di biblioteca partecipano rappresentanti dei detenuti e degli internati*).

<sup>1017</sup> Interview with Kimberley, prisoner at UK-2 (27 February 2019): "there is the gym everyday if you want it to, there are more activities [...] and that's a valuable thing to have and it keeps you happy, it keeps you busy because you got your bit of little work that keeps you occupied."

<sup>1018</sup> Interview with Craig, prisoner at UK-1 (28 November 2018): "I wanted to do my English and Maths. And I wanted actually to get through my exams, so that's what, they put me in after two days I was in, and I was in ever since. And I passed like my entry free exam and I am studying my level 1, and that's what I am doing. And it's kind of giving me a positive feeling. I did my exams on the outside, in the school I had some mental problems, I left early. And, so I never even got any GCSEs, so I kind of put this like bad thing of being in prison into a good thing."

<sup>1019</sup> International bodies have repeatedly called States to avoid isolation based on sexual orientation and gender identity, as it prevents LGBTQ inmates from accessing activities or services important for their physical and mental health, as well as from allowing them to meet the conditions necessary to apply for time off for good behaviour, or parole. UN Committee Against Torture, Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment CAT/OP/C/57/4 (22 March 2016), par. 64; see e.g. UN Committee against Torture, Brazil – Concluding observations, CAT/A/56/44 (16 May 2001), par. 119(b).

<sup>1020</sup> Interview with Elena: "in the female prison they allow you to play volleyball once a week with the girls or twice a week, you do the air with the girls and you have more possibilities of socialising with other people" (*nel carcere femminile ti permettono di giocare una volta alla settimana a pallavolo con le ragazze o due volte alla settimana fai l'aria con le ragazze e magari con più possibilità di socializzare con altre persone*).

<sup>1021</sup> See Waaldijk, n.123.

<sup>1022</sup> The EPR regulate that there are various forms of solitary confinement. Exceptional solitary confinement consists of holding a prisoner in a single cell with access to light and air. The inmate can hear prisoners moving in the adjacent area.

as well as their mental and physical health, in light of potential risks to violate the sex prohibition policy. Participants reported that they have been forbidden to even talk with cisgender male prisoners, and if transgender people do so during open air time, they have to keep it hidden from staff, as it is formally a violation of prison rules.<sup>1023</sup>

Homosexual prisoners may suffer similar limitations. Participants in the VPU at UK-1 described an activity regime where vulnerable prisoners are completely separated from the rest of the population, including during open air time and at the gym.<sup>1024</sup> Although the stigma sex offenders suffer from virtually any other group within prison could justify this decision, homosexual prisoners who are not sex offenders become victim of an extra layer of victimisation, as the other prisoners associate them with even more highly stigmatised categories. In addition, this regime does not seem to be integrated with activities raising awareness on sexual orientation or gender identity-related issues: “anything for the LGBT focus group it would be for this wing specifically, and the mains specifically wouldn’t interact with us.”<sup>1025</sup>

In Italian prisons providing special wings for homosexual prisoners, other inmates cannot enter the section. They have the opportunity to meet them only in common areas. This is a slight improvement from the VPU regime, but as Roman noticed, the blanket ban on accessing the wing may extend also to attempts to have a chat with another prisoner hosted in a general wing.<sup>1026</sup> Such environment, although appreciated by some participants, does not seem to reduce stigma against LGBTQ prisoners, but simply “removes” the problem by isolating these minorities even more. Furthermore, not all Italian prisons allow the mixing of LGBTQ prisoners and other inmates in common areas, as the case of ITA-1 demonstrates.

#### 6.4.1 Gendered activities: the conflation among sex, sexual orientation and gender informs the programmes offered to prisoners

An issue that emerged from participants’ accounts concerns the type of activities offered to women, and to transgender prisoners located in special wings with limited or no access to services offered to the male prison population.

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This can be used only for short periods of time and the staff shall make reasonably frequent and regular contact with the prisoner. EPR, Rule 60.

<sup>1023</sup> Interview with Silvia, prisoner at ITA-3 (7 August 2018): “They do not allow us to talk with the boys, because it is prohibited” (*Dei ragazzi però non ce lasciano parlare con loro perché no es proibido no aver contatto e parlare*).

<sup>1024</sup> Interview with Simon, prisoner at UK-1 (28 November 2018): “[activities are] run completely separate from the mains, so even when you go to the gym, you go to your own gym session, everything. We never get to do anything at all with the mains, anything at all whatsoever.”

<sup>1025</sup> Interview with William, prisoner at UK-1 (28 November 2018).

<sup>1026</sup> Interview with Roman, prisoner at ITA-4 (22 August 2018): “Like, drinking a coffee in the cell, or having a chat with a general prisoner, unless he is a worker assigned to working in the floor, it is not possible” (*Tipo bere il caffè in cella con un commune, o scambiare Quattro chiacchiere, a meno che non sia un lavorante lì fisso non può venire, ok?*).

In the UK, the 2007 Corston Report recommended the necessity to introduce a differential treatment for women in order to comply with the the EA 2010 objective to eliminate gender discrimination.<sup>1027</sup>

Similarly, the Italian *Stati Generali* on the enforcement of criminal sentences concluded that the issue of female detention cannot be narrowed down only to the issue of maternity inside prison; many other problems should be considered, including professional training and education, as well as the introduction of recreational and sports activities.<sup>1028</sup> More specifically, the Working Committee, recalling the UN Bangkok Rules, recommended to ensure that women prisoners hosted in sections with a majority of men have the possibility of attending the educational, sport and recreational activities organised for men, while professional courses to obtain qualifying diplomas should be increased, favouring activities that are not only “stereotypically” feminine.<sup>1029</sup> Although the recommendations continue referring to a binary men/women divide, these provisions can be interpreted to include transgender women as well. Critically, transgender men remain an even more invisible part of the prison population than other LGBTQ groups.

In practice, these proposals, which are informed by human rights standards based on the principle of equality and diversity are hardly applied, and when they are, there is a lack of uniformity in the way each prison deals with gender equality.

Indeed, these standards imply that meaningful activity should be foreseen for women based on an individual approach capable of addressing each one’s specific needs.<sup>1030</sup> However, this should not translate to a definition of difference based merely on a biological divide, but on an assessment of prisoners’ needs that would take into account different sexual orientations and gender identities and go beyond essentialism.

For example, Cynthia wished to have more activities similar to the ones conducted in the nearby male prison:

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<sup>1027</sup> Corston report, n.654. The report reflects what the literature on women prison has observed for years: see e.g. Hannah-Moffat, n.266; Jackie Lowthian, ‘Women’s prisons in England: barriers to reform’, in Pat Carlen ed., *Women and Punishment. The Struggle for Justice* (Willan Publishing 2002).

<sup>1028</sup> Stati Generali dell’Esecuzione Penale, Tavolo 3 – Donne e Carcere (Workgroup 3 - Women and Prison), 5 February 2016, at [[https://www.giustizia.it/giustizia/it/mg\\_2\\_19\\_1\\_3.page?previousPage=mg\\_2\\_19\\_1](https://www.giustizia.it/giustizia/it/mg_2_19_1_3.page?previousPage=mg_2_19_1)], accessed 30 December 2019.

<sup>1029</sup> Ibid. The Committee stressed that the law on Prison includes only one provision specifically concerning women prisoners, stating that they must be hosted in separate institutions than men. The new reform established a non-discrimination principle including sex as a ground for non-discrimination, and provides that prison shall have in place special health services for pregnant prisoners, or newly mothers. Furthermore, the law now stipulates that equal access to professional and cultural activities should be guaranteed to both men and women: see Art. 1, 11 (8), 14 and 16 Italian Law on Prison. Although this is significant progress, the reform still regulates the female prison experience by adopting an “othering” approach in opposition to men’s, and continues focusing more on women in light of the motherhood experience. Even if it is important to consider this condition, the law and its application by the Prison Service should do more to go beyond the normative representation of women prisoners as subsumed to men’s, by conducting a deeper analysis on the representation of the female prison experience. Furthermore, the law still falls short from considering prisoners’ gender, sexuality and gender identity beyond the biological characteristics that makes an individual “a woman”.

<sup>1030</sup> Corston report, n.654.



*“they do woodwork, they do painting and decorating, they do brick laying. All things that I am in into. I love getting my hands dirty. This prison is very girly girly. Cooking, sewing, knitting, things like that, and when you are not into cooking, knitting, and sewing...”*<sup>1031</sup>

On the other hand, Elena affirmed that the prison management at ITA-3 was planning to introduce a tailoring course, “but it will be only for us [transgender women], obviously”.<sup>1032</sup> However, she also said that years ago she and another transgender inmate participated to a house painting course together with cisgender male prisoners, and everything turned out fine: “it was a positive experience, but it was short and a one-time thing.”<sup>1033</sup>

These stories show two trends emerging from these narratives: first, activities are often designed around gendered identities. It is assumed that women can only enjoy, or should engage, with certain kinds of jobs, whereas men should pursue more masculine enterprises. Secondly, LGBTQ inmates suffer from the double stigmatization attached to “sexual panic”: transsexual women must not interact with cisgender men for fear of sexual contacts taking place. Similarly, homosexual men cannot mix with the heterosexual prison population unless supervised, formally in light of security reasons; however, there are clear homophobic and sexualised assumptions in prison policies aimed at avoiding “unnatural” encounters.

These narratives confirm theories linking the construction of prison masculinities around the organisational structure of prison. They maintain that the coordination of prison life aligns with the performance of an essentialist masculine type who undertakes activities that manifest its power over other prison categories. Contextually, the homosexual and the transgender subject end up being isolated (in male settings) or “erased” (as periodically happens in female prisons), in an implicit association with sex offenders or other negatively judged categories, thus becoming the “antithesis of prison masculinity.”<sup>1034</sup>

Here the masculine organisation of prison intersects with the gendered qualification of activities, which constitutes another factor contributing to the exclusion of LGBTQ people from prison life and rehabilitation programmes.

The examples described above support Sim’s theory that prison management is embedded in discourses of femininity and masculinity.<sup>1035</sup> I would add to this argument that sex negativity contributes to the

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<sup>1031</sup> Interview with Cynthia, prisoner at UK-2 (27 February 2019).

<sup>1032</sup> Interview with Teresa, prisoner at ITA-3 (7 August 2018) (*adesso vogliono fare il corso di sartoria però ovviamente sarà solo per noi*).

<sup>1033</sup> Interview with Elena, prisoner at ITA-3 (7 August 2018) (*due anni fa ho avuto accesso ad un corso di imbianchina, io e un'altra ragazza abbiamo imbiancato una sezione [...] è stata un'esperienza positiva, ma breve e unica nel suo genere*).

<sup>1034</sup> On this line, see Eamonn Carrabine and Brian Longhurst, ‘Gender and Prison Organisation: Some Comments on Masculinities and Prison Management’ (1998), 37 *The Howard Journal* 2, 161-76, at 163; see also Carolyn Newton, ‘Gender theory and prison sociology: using theories of masculinities to interpret the sociology of prisons for men’ (1994), 10 *Howard Journal*, 193-202. Newton theorises that the masculine organisation of prison encourages a masculine organisation among prisoners.

<sup>1035</sup> Joe Sim, ‘Tougher than the rest? Men in prison’, in: Tim Newburn and Elizabeth Stanko (Eds.), *Just Boys Doing Business? Men, Masculinities and Crime* (London: Routledge 1995).

disproportionate victimisation of LGBTQ prisoners. It remains however a valid point that the power structure inherent in the prison organisation excludes the possibility of recognising non-stereotypical expressions of masculinities, or to use Butler's notion of performativity, plural performances of gender and sexuality.

The introduction of a Transforming Rehabilitation Plan by the UK government, foreseeing a holistic approach to the treatment of female offenders, and the increase of community service for women,<sup>1036</sup> could assist in deconstructing the essentialism defining the female and male prison archetype while embracing a pluralistic view of masculinities and femininities.

In this regard, it is interesting to analyse those penal estates I visited that have made attempts to introduce a discourse addressing gender and sexual diversity, and reflect on how the prison management developed it.

#### 6.4.2 Representation of sexual orientations and gender identities in the prison activities programme

In the UK, the adoption of a legal framework that explicitly calls for public authorities to protect sexual orientation and gender reassignment in light of the principle of equality<sup>1037</sup> has also had repercussions in the administration of prison life. The Prison Inspectorate found that the most neglected dimension of equality is sexuality and called for policies on sexual orientation to be redrafted in order to promote a more supportive culture.<sup>1038</sup>

Particularly, the introduction of prisoners' representatives for each of the protected categories described in the EA 2010 has been described in positive terms by all interviewees hosted in English penal institutions. Some participants, such as William, Simon, Drew and Vera were indeed acting as representatives for LGBT prisoners, whereas Kimberley was interested in applying for the role.

The presence of individual representatives for homosexual and transgender inmates is beneficial during the induction process after admission into prison, but it is also helpful for the prisoners appointed to this role, who have the opportunity to better understand which rules inform prison life, as well as to extend their network with other prisoners and the staff.<sup>1039</sup>

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<sup>1036</sup> House of Commons. Justice Committee, *Women offenders: follow-up*, Thirteen Report of Session 2014-15 (17 March 2015).

<sup>1037</sup> EA2010.

<sup>1038</sup> The Prisons and Probation Ombudsman has raised the problem of homophobic abuse and the lack of support for gay prisoners which have been neglected in diversity policies. See Easton and Piper, n.844, at 357.

<sup>1039</sup> Interview with Drew, prisoner at UK-2 (27 February 2019): "then I went and asked if I can do the transgender rep. And we get to go to board rooms, and at meetings and things, and I've always sought to try to voice concerns about the way things are dealt, the way things maybe could be changed slightly. I think a lot of people don't understand and that could be a problem."

It constitutes a relevant change in the organisational power dynamics between prison management, staff and prisoners that the latter have the possibility to “try to voice concerns about the way things are dealt, the way things maybe could be changed slightly. I think a lot of people don’t understand.”<sup>1040</sup>

Representatives act as signposts for prisoners’ issues concerning discrimination, mediating between the prison population and staff when inmates do not feel comfortable to issue an official complaint or talk directly to the staff: “Basically if anyone feels it’s been discriminating against, it comes to me, and I’m signposting them in the right direction.”<sup>1041</sup>

Nevertheless, representatives’ assistance during the induction process presents some potential risks, for example in relation to the disclosing of confidential information concerning sexual orientation or gender identity, which could amount to a violation of prisoners’ right to privacy.<sup>1042</sup> Simon mentioned that when a prisoner fills in the questionnaire they receive at admission by checking on “other” in the question regarding sexual orientation, he normally sees it as a hint that that individual is probably homosexual. Even if well-intentioned, first hours and days in prison represent a very delicate moment for inmates’ well-being, and representatives should be very careful in the way they decide to interact with new prisoners on such issues.

Moreover, prison staff and management should consider the potential pitfalls of having prisoners knowing these details and possibly outing prisoners with other inmates in the wing.

LGBT prisoners’ representation is a recent addition to prison roles,<sup>1043</sup> and it remains to be seen if it will have a lasting positive impact. Most will depend on the parallel progress in implementing awareness training for prison staff. Certainly, this innovation has the potential of “queering” the prison organisational structure, although the Foucauldian dynamics of surveillance are still entrenched in the carceral system. It is also not clear whether the effects of having an LGBT representative will impact on the hypermasculine, homophobic and transphobic environment of the general population wings, or will rather remain limited to certain groups of inmates within the penal estate.

Support groups represent another LGBTQ-specific activity provided by English prisons. These seemed to be more developed at UK-2, whereas at UK-1 the management were planning to set one up. In the latter, the number of homosexual or transgender prisoners is very fluctuating: at the time of the interviews, only five self-identified homosexual inmates were present in UK-1 VPU; therefore, creating a group proves to be more complicated if demand is limited, and it is perhaps not perceived as a pressing issue.

Vera explained that at UK-2 the management “call focus groups once a month, so if anyone is struggling, say coming out, they can come and Ms B can signpost them to the GH [an LGBT charity promoting equality and

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<sup>1040</sup> Interview with Drew, prisoner at UK-2 (27 February 2019).

<sup>1041</sup> Interview with Vera, prisoner at UK-2 (27 February 2019).

<sup>1042</sup> Interview with Simon, prisoner at UK-1 (28 November 2018): “As well as being the LGBT wing mentor. So I have got a first-hand opportunity to possibly identify someone who may be hesitant of identify themselves as either bi-curious, bisexual or gay.”

<sup>1043</sup> Interview with Simon, prisoner at UK-1 (28 November 2018): “the LGBT mentor role was introduced to the wing probably about 4-5 months ago.”

inclusion].”

In a prison where measures are more organically implemented to acknowledge sexual and gender diversity, participants welcomed the additional support and felt more recognised. Even if many serious issues still remained in terms of ensuring healthcare and well-being and protecting LGBTQ prisoners from discrimination, it constituted a step forward towards challenging a heteronormative-based organisation.

In contrast, in Italy the situation for LGBTQ people in confinement is more problematic. At ITA-3 and ITA-4, homosexual and transgender inmates usually have periodic contacts with some members of staff. Counselling services or focus groups with social workers (for example, with a criminologist) were provided, but quite sporadically and seemingly only as a reaction after tensions arose among inmates. This does not seem sufficient to address problems connected to isolation, while intersectional issues within the wing would require a deeper rethinking of the whole wing organisation.<sup>1044</sup>

The occasional nature of these meetings and the way they are organised play a role in their effectiveness in favouring inclusivity. At ITA-5, Fiona and Andrea referred to an event where a social worker explained to inmates some basic notions concerning gender identity, such as the meaning of the term transgender. Both participants appreciated the meeting, but they also mentioned another prisoner who, in spite of having attended it, went on making transphobic remarks, such as: “Didn’t you hear that the social worker says that transgender people are sick?” Raising awareness and acceptance of sexual orientation and gender identity can be troublesome in a context where prisoners come from very different backgrounds, but it can be even harder if similar initiatives are held sporadically, or on the basis of the good will of some social workers, rather than becoming an integral part of prison programmes. It is even more difficult when the national legal framework does not offer a comprehensive statutory instrument establishing the principle of equality also on the basis of SOGI, thus hampering the internalisation of international human rights standards.

Organising activities that are significant to the LGBTQ prison population, while at the same time involving other prisoners, can be a key factor in increasing cisgender or heterosexual inmates’ familiarity with these issues, and to stimulate people’s creativity, giving them a sense of belonging to a community even if inside prison. Vera describes the presence of LGBTQ representatives also in the staff and Governor’s board as a positive development that created a shift in the way LGBTQ prisoners are treated in this context.<sup>1045</sup>

A meaningful moment for participants located at UK-2 coincided with the preparation of the second Pride event inside the premises. Cynthia, Vera and Drew talked about this as a fun occasion for them, as well as a moment where they contributed to the community outside, as they raised money for a local charity. A few

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<sup>1044</sup> For instance, when I visited the premises a group of transgender prisoners had a meeting with a criminologist in order to solve some problems between some prisoners within the wing. Elena pointed out that the meeting was held to discuss the reason behind some fights between transgender women in the wing, but the people who actually started the quarrel did not attend the meeting with the criminologist, thus weakening the outcomes of this initiative.

<sup>1045</sup> Interview with Vera, prisoner at UK-2 (27 February 2019): “In here now they have a rep, and then they have a member of staff, and then they have one of the Governors. So the Governor has to have an LGB rep, and a member of staff who is LGB rep, and then there is me. So before they didn’t have that. So each strand has someone like that.”

complained by questioning the nature of the event, but it ended up being a positive experience overall:

*“Last year we had the gym we had some stars out, so just like a bit of a fun, and then the pride flag, and stalls, sweet stalls, and kids stalls, and we made money for a charity. We made 231 pounds so that’s good. They did like poetry and art work for Pride, which was good as well. And then there was a lot of pictures shown so it was a good day.”*<sup>1046</sup>

The Pride event could be seen as a momentary subversion of prison roles, and as an exception to the tendency towards making LGBTQ prisoners’ invisible.<sup>1047</sup> It is also an interesting initiative to be conducted within prison, if considering that Pride parades represent a moment of exposure of minority identities, deeply linked with sexuality, gender and the sexed body, which are normally kept private to society, but for a day come to the front of the public sphere. It seems also ironic that an event meant to signal a deeply political opposition to the criminal justice forces discriminating and harassing LGBTQ minorities were celebrated inside the very physical representation of those forces.<sup>1048</sup>

On the other hand, Pride is “fun” for participants, as well as an opportunity for supporting charities working to overcome LGBTQ people’s struggles. At the same time, the mechanisms of surveillance characterising prison hinder any forms of protests for the daily erasure of prisoners’ sexuality and expressions of identities. Furthermore, Pride is possible in penal estates where prisoners are not separated on the basis of their sexual orientation or gender identity. Orientation is a relational concept, to use Ahmed’s words: if the prison space rejects queer identities by segregating them, such relational encounters are extremely limited, aversed.<sup>1049</sup> When prison organisation focuses on the space occupied by the heterosexual cisgender majority, queer minorities remain in the background, the prison organisation directing the normative sight by condemning the unseen to relegation.<sup>1050</sup> As Drew commented when asked about special wings for transgender prisoners:

*Most people accept me now, they are used to me. It’s about what people get used to. So that’s why I don’t agree with the segregation because people will get used to that, and then you segregate everything. And then to me it’s like some sort of more of a concentration camp scheme than a human scheme, when people are accepted for who they are and what they are.”*<sup>1051</sup>

But organising a Pride inside prison allows the people in the background to acquire centre stage for at least one day. It also represents the temporal emergence of people at the margins. As Cynthia recollected, when she

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<sup>1046</sup> Interview with Vera, prisoner at UK-2 (27 February 2019).

<sup>1047</sup> Prisoners organising the event also provided for items with LGBT colours, and “a hairdresser that make the hair for you in LGBT colours” (Interview with Cynthia, prisoner at UK-2 (27 February 2019)).

<sup>1048</sup> Gay Pride dates back to the Stonewall riots of 1969, triggered by a police raid on a gay bar on Christopher Street, which is considered by many the birth of the contemporary gay movement for the demand of gay rights. In fact, instead of remaining passive, the transvestites and homosexuals frequenting the bar fought back. See Michael Warner, *Publics and Counterpublics* (New York, 2002), p. 23, 51.

<sup>1049</sup> See Ahmed, n.29.

<sup>1050</sup> See Ahmed commenting Husserl’s ideas in ‘Orientations in Queer Phenomenology’ (2006), 12 *GLQ: A Journal of Lesbian and Gay Studies*, Volume 4, 543-574.

<sup>1051</sup> Interview with Drew, prisoner at UK-2 (27 February 2019).

entered prison for the first time, homosexual acts were punished with imprisonment. Having the possibility to celebrate Pride – even if in confinement – had a historical significance for her that she was very aware of.<sup>1052</sup>

Nevertheless, the message of freedom inherent in the organisation of Pride cannot but clash with a carceral system based on surveillance. The balance between these two values depends on the prison regime, and on the degree of autonomy granted by the Governor.<sup>1053</sup>

The aspiration is for events such as Pride and other LGBTQ activities to challenge what Butler calls the repetition of bodily acts that produces the essentialist masculine prison subject model around which the normative paradigm of prison is informed. This seminal attempt needs to be supported by enacting a (queered) human rights-based legal framework, alongside the internalisation of these principles by the human actors who embody the prison organisational structure, and consciously or not create instants of queerness.

## 6.5 The relational dimension of prison life

One element connecting together all the practices explored in previous sections relies on the regulatory power regarding relationships among inmates, particularly if LGBTQ.

HIV treatment programmes and condom distribution are based on the fundamental principle of protecting people's health, but they also imply that prisoners have sexual intercourse during their imprisonment. The separation of homosexual and transgender prisoners from the rest of the prison population is not only enacted for security reasons, but also to avoid establishing “indecent” intimate arrangements between prisoners.

Policies aimed at placing transgender prisoners safely and guaranteeing them opportunity to complete the transitioning process favour individuals who can prove to have a stable identity within the accepted gender binary paradigm, without upsetting the heteronormative dynamics of relationships, where gender identity is contemplated only when conflated with sex and sexual orientation. Identities who disrupt the paradigm and cannot adapt to the scheme must be separated. Particularly, transgender women in male prisons face harder consequences from segregation practices than homosexual men, as any contacts between them and heterosexual men, in any degree, would be deemed unnatural, therefore disrupting the organisational power of State prison authority.

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<sup>1052</sup> Interview with Cynthia, prisoner at UK-2 (27 February 2019): “I think it's improved a lot [how they treat lesbian prisoners]. When I first started coming into prison I was 21. They used to have a special charge LA and that stood for Lesbian Activity and that could be anything. From having sex to someone, to putting your arm around a leg. The rule was, if you sat on somebody's bed, you have to have one foot on the floor. And if you didn't, and it had to be flat on the floor.”

<sup>1053</sup> Cynthia explains this clash well: “I think it's a category (E?) big prison I think. But they don't really categorise women. It's...you don't...you know here you've seen prisoners moved around by officers, it's not like this in Styal;. If I have been in S HMP and you'd come to visit me they would say take your cell off you've someone to see you [sic] in visit and I would go back on my home. And when I finished I would go back on my own. So the Gay Pride over at S HMP, they have the music going, they have a little golf truck that drives you around jail with all the music going, it's like proper Pride, but here because of the security all they can do is a little celebration in the gym.”

This section focuses on the way the law represents relationships between prisoners, mainly in terms of provisions formulated to prohibit sexual engagements. It highlights the dichotomy between the relatively vague, sketched out legal framework regulating contacts, and the much more complex relational dynamics emerging within the prison context, both in male and female prisons. It considers the more detailed legislation on social visits, which is based on the human rights principle of ensuring that prisoners maintain contacts with their family, yet it ultimately includes a number of barriers preventing physical demonstrations of affection. Finally, it reflects on participants' views concerning conjugal visits, and the importance they would have as a first step towards the acknowledgment of a right to relate within prisons.

### 6.5.1 Contacts among prisoners: a story of legal prohibitions based on sex negativity

International and domestic laws construct prison relationships as asexual, or they accept them only if they comply with a State mandated notion of “normalcy”, which also informs the human rights discourse on both gender and sexuality.<sup>1054</sup> Yet, the normative boundaries of the carceral system lead to forms of resistance, with LGBTQ prisoners re-orienting their sexuality and identity in light of a new geography of surveillance and erasure.<sup>1055</sup>

Both the English, and Italian prison system present a similar dichotomy between law and reality: regardless of the legal discourse, aimed at acknowledging the normalised subject and refusing the undesired<sup>1056</sup> on the basis of order, security and morality claims, atypical subjects form either bonds of affection or organise through hierarchies of power in the shadow of the dominant legal paradigm.

This leads to question the idea of imprisonment as aimed at rehabilitation, as required by international law. Preserving relationships is considered an integral part of the rehabilitation process. However, these end up being limited either as a result of the content of the custodial sentence (e.g. in Italy visits are restricted for particular serious crimes) or as an administrative choice made by the prison management to ensure internal security. As illustrated by Liora Lazarus, the former limitation demands that a balance be struck between the retributive element of punishment and the right to protect family life, while the latter evokes a more specific assessment of the proportionality of the internal prison policy against the limitations of prisoners' right to contact.<sup>1057</sup> This study focuses particularly on this aspect of punishment. A queer theory analysis is helpful to orient a human rights-based assessment in order to comprehend the justifications behind policies restricting contacts among prisoners. In participants' accounts, these often reveal an underlying bias against diverse expressions of sexualities and identities.

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<sup>1054</sup> See Chris Ashford, Alexander Maine, Giuseppe Zago, ‘Normative Behaviour, Moral Boundaries and the State’, in Chris Ashford and Alexander Maine (eds.), *Research Handbook on Gender, Sexuality and the Law* (Elgar 2020); Gonzalez-Salzberg, n.117.

<sup>1055</sup> See in this regard Ashford, Maine and Zago, *ibid*.

<sup>1056</sup> On the notion of the “undesired” and normalisation of the legal subject, see Stychin, n.61.

<sup>1057</sup> Lazarus, n.164.

Such scrutiny shows that the English system's overreliance on the ill-defined security aim serves to legitimise deprivations of basic aspects of prisoners' human dignity in the relational sphere, without truly addressing the perpetuation of sex negativity and toxic masculinity within prisons.<sup>1058</sup>

Although there is no specific rule prohibiting sex among prisoners in the UK,<sup>1059</sup> Prison Rule 51(20) states that insulting behaviour can lead to an offence against discipline; among prisoners' behavioural expectations, the HMPPS specifies that prisoners must act with decency, including in their cells, thus avoiding sexual activity (PSI 30/2013).

However, "if two prisoners sharing a cell are in a relationship and engage in sexual activity during the night when they have a reasonable expectation of privacy, a disciplinary charge may not be appropriate" (PSI 47/2011, par. 1.76). This seems to be some sort of exception to the HMPPS opposition towards sexual activity inside prison, although it is not clear if the relationship must have been pre-existing, or if the same-sex couple shall be married or in a civil partnership before or after entering prison, similarly to what the law requires in terms of social visits. The logics behind the "night exception" is equally unclear, considering the general lack of privacy of the prison environment, thus making the behaviour potentially "indecent" at any time. Moreover, the use of the verb "may" is vague and does not give prisoners a precise picture of their rights and obligations.<sup>1060</sup>

UK courts have examined a number of cases concerning the request of same-sex partners to have access to inter-prison visits, or to continue sharing a cell together. The judiciary has ruled against the applicants' complaints by balancing the prison authority's obligation to maintain order and security inside prison against the protection of the right of private and family life on the basis of Art. 8 ECHR.

The indeterminacy of the legal framework allows judges to exercise a wide discretion in their decisions, supporting a rationale that is often based on moralistic evaluations. For example, courts have denied the right of applicants to visit each other in at least two cases involving same-sex partners<sup>1061</sup> by accepting the prison authority's justification that same-sex partners may end up being separated due both to reasons of "good order and discipline", and because prison officials cannot distinguish between consensual and coercive relationships.

The latter justification was raised also in the *Hopkins v Sodexo/HMP Bronzefield* case, concerning two civil partners sharing a cell together, even though the applicant claimed that they had never engaged in sexual activity, while no evidence denying this statement was submitted by prison representatives.<sup>1062</sup>

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<sup>1058</sup> On toxic masculinity within prison institutions, see Connell, n.56; Sabo and others, n.210.

<sup>1059</sup> Stevens, n.316.

<sup>1060</sup> To add more ambiguity, HMPPS regulations foresee the possibility of distributing condoms inside prison for health reasons, which implies that it is known for a fact that sexual activities take place within penal establishments: HM Prison and Probation Service, Prison Service Order 3845, 30 April 1999.

<sup>1061</sup> *R (Bright) v Secretary of State for Justice* [2014] [2015] 1 WLR 723,547,553; *O'Neill v Scottish Ministers (No.1)* Outer House [2015] CSOH 93.

<sup>1062</sup> *Hopkins v Sodexo/HMP Bronzefield* [2016] EWHC 606 (Admin).



In the cases above, the applicants enjoyed different legal status: some were civil partners even before entering prison, while in other circumstances they entered a civil partnership after imprisonment, or they remained *de facto* partners after having met in prison without legally acknowledging their relationship.

These differences did not enter into the courts' reasoning, which considered plausible that the prison staff could not determine whether the relationship was coercive or consensual according to the circumstances of the case. Perhaps there should be at least a difference in treatment between informal couples and partners whose relationship is officially recognised by the State; otherwise, the trend emerging from case law seems to be that such relationships are assumed as being non-consensual.<sup>1063</sup>

In Italy, a similar scenario applies to the regulation of relationships in prison. The law remains silent regarding the possibility that same-sex relationships were established, or same-sex sexual intercourse can take place in confinement. The relational discourse is represented within a legal paradigm only to the extent that it concerns "respectable formats", such as marriage between heterosexual couples without previous convictions.<sup>1064</sup> The 2018 reform of the law on prison did not integrate the Parliamentary Committee's recommendations to introduce conjugal visitation programmes as part of prisoners' right to maintain contacts with the outside and facilitate rehabilitation,<sup>1065</sup> in spite of the Committee's stance that the right to "relate" (*diritto all'affettività*) descends from the principle of human dignity, and as an inalienable right it should be recognised and protected.<sup>1066</sup> Although the right to relate is never mentioned in the Constitution, it represents an "undeclared right", which is protected even if not expressly mentioned by this primary source.<sup>1067</sup>

Interestingly, these discussions did not explicitly deal with the possibility of same-sex individuals starting a relationship while imprisoned, or same-sex couples being admitted together into prison. In addition, the debate revolved around the notion of "affection" (*affettività*), which is comprehensive of "facts and relational

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<sup>1063</sup> The case law of the ECtHR leaves some margin of appreciation to the States in similar cases. In *Klamecki v Poland* (No.2), the Strasbourg judges dealt with an overarching ban on contacts between prisoners who were partners. The Court made it clear that an absolute prohibition of any kind of contacts for prisoners who are partners, paired with the censorship of their correspondence and the impossibility to have phone calls, without any reviews of the initial assessment scheduled, constitute a violation of Art. 8 ECHR, particularly considering that the prison management could have looked for alternative measures to ensure prison security, such as providing supervised visits or limiting the frequency or duration of contacts. *Klamecki v Poland* (No.2), App. n. 31583/96, (ECHR, 3 April 2003).

<sup>1064</sup> This approach reflects Gayle Rubin's theorisation of sex negativity regulating Western society relational dynamics.

<sup>1065</sup> Stati Generali dell'Esecuzione Penale, Tavolo 6, n.10.

<sup>1066</sup> *Commissione Giostra*, n.773, Introduction, at 7. The document summarising the main conclusions from that experience highlighted how sexuality and relationship should be considered as fundamental rights, to fully accomplish the notion of prison punishment aimed at rehabilitation and individuals' reintegration in society. Sperti observes that judicial decisions issued by constitutional courts of different States regarding sexual orientation-related rights have stressed an interpretation of the principle of human dignity as a relational phenomenon, which connects with the principle of equality to enhance individuals' demand of mutual respect. See Sperti, n.705. Developing relationships among individuals should thus be considered an essential right, even in a context of deprivation of liberty.

<sup>1067</sup> The term "undeclared right" (*diritto sommerso*) is used by Silvia Talini (n.316). See also Martina Salerno, 'Affettività e sessualità nell'esecuzione penale: diritti fondamentali dei detenuti? L'atteggiamento Italiano su una questione controversa' (2017), 1 *Giurisprudenza Penale Web*, 1-17. It refers back to the fundamental constitutional principles, and to the right to private and family life as provided by art. 8 of the ECHR.

phenomena (feelings, emotions, passions and so on)”.<sup>1068</sup> The words sex or sexuality were rarely used, almost to deny that a relationship between two prisoners can entail this dimension.

### 6.5.2 An analysis of the discourse behind the ban on conjugal visits

A growing number of European countries provide for programs that allow prisoners to enjoy some time in private with their partners, families or friends.<sup>1069</sup> England and Italy are not among them.

In England, the issue of conjugal visits has been addressed by courts only tangentially in relation to other topics, mainly linked with reproductive rights. In *R (Mellor) v Home Secretary*,<sup>1070</sup> the Court of Appeal examined the claim of a prisoner who, in absence of conjugal visits, asked to access facilities with the aim of having a child with his wife through IVF, arguing that by the time of release, his wife would be too old to conceive a child. The Prison Service considered instead the impossibility of conceiving children during imprisonment as a consequence of this form of punishment. The Court adopted a strikingly traditionalist conception of family to reject the claimant’s complaint, by stating that the deprivation of reproductive rights is justified by the impossibility for the father to participate in the development of the child.<sup>1071</sup>

Livingstone highlights how this decision proves the harsher standards prisoners are subjected to as compared to the general population.<sup>1072</sup> Still, the Court also considered the difference between a prevention policy in cases where there would still be a chance for prisoners to procreate after release, and the circumstances where this would not be possible anymore.<sup>1073</sup>

In the similar case of *Dickson*, both UK courts and the ECtHR ended up deciding in favour of the State, also by looking at the type of crime committed by the applicant as a more serious factor than the scarce chances Mr Dickson’s wife had to be able to procreate at 51. However, this interpretation once more seems to defy the purpose of imprisonment as a site for rehabilitation, if the seriousness of the crime trumps prisoners’ rights to privacy and have a family.<sup>1074</sup>

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<sup>1068</sup> Treccani Dictionary online, Entry “Affettività”, at [<http://www.treccani.it/vocabolario/affettivita/>], accessed 18 September 2019: “In psicologia, l’insieme dei fatti e dei fenomeni affettivi (sentimenti, emozioni, passioni, ecc.) che caratterizzano le tendenze e le reazioni psichiche di un individuo.”

<sup>1069</sup> Among countries that allow conjugal visitation programs, see e.g. Albania, Austria, Belgium, Croatia, Denmark, France, Finland, Germany, Norway, The Netherlands, Spain, Sweden and Switzerland. For an overview of international human rights standards on this issue, see Chapter 4.

<sup>1070</sup> [2002] QB 13.

<sup>1071</sup> Ibid. par. 43.

<sup>1072</sup> Livingstone, n.635, at 355.

<sup>1073</sup> *R (Mellor) v Home Secretary*, n.669.

<sup>1074</sup> The ECtHR manifested however support for conjugal visitation programmes, underlining the reform efforts of many European countries which introduced similar ones. Notably, the Court appears more prone to consider the positive aspects of unmonitored visitation programmes when they link with the notion of heterosexual, procreative family. In *Dickson*, the applicant was married to a woman and the couple was refused the possibility to undertake IVF in order to have a child. In a previous case, when the request for conjugal visits came unrelated to procreative purposes, the European Commission of Human Rights relied on the principle of maintaining good order and security to adopt a more restrictive approach.

The State's incapability to contemplate prisoners – and same-sex prisoners – as sexual subjects can lead to contradictory reasoning, such as when the Home Office refused to allow prisoners to marry also because a prisoner cannot cohabit with their spouse:<sup>1075</sup> the ECtHR recognised in *Hamer v United Kingdom* that the right to marry does not require cohabitation, thus rejecting this argument.<sup>1076</sup> This example proves two important points: human rights bodies can overturn domestic policies limiting human rights, and have the potential to “queer” traditionalist views of relationships; however, State power and international institutions are more open to protect people's privacy, and their right to have a family, when marriage between heterosexual couples is involved. Indeed, the cohabitation requirement remains as strong evidentiary requirement for *de facto* couples, regardless of other evidence of the strength and seriousness of their bond.

In Italy, the provision of dedicated spaces where prisoners and their partners can enjoy their right to relate and their sexual sphere remains an unresolved issue. The Constitutional Court examined a case contesting the constitutional legitimacy of the legal provision imposing the prison staff's power of visual inspection over prisoners' visits, thus preventing the prisoner and their partner from fully enjoying their right to relate, including its sexual dimension. Although the Court found the case inadmissible, it referred to the ECtHR's call upon States to adequately protect the right to sexuality as part of the rehabilitative scope of imprisonment.<sup>1077</sup> The Court framed the right to private visits as a question tackling the legal definition of the boundaries of a custodial sentence rather than a policy issue that can be modified by changing administrative regulations.

Despite the judges' decision to not modify the law, Pugiotto observes that the highest court clearly denounced the prison law shortcomings, as the current legal framework substantially denies prisoners a fundamental right. Although the Italian prison system allows prisoners to apply for temporary release, this is not accessible to all inmates and can be obtained only if quite strict conditions are met. Therefore, the silence of the law enforces a truly operational prohibition.<sup>1078</sup>

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*Dickson v UK*, Application no. 44362/04 (ECHR 4 December 2007); *X and Y v Switzerland*, 3 October 1978, (ECHR 1979) 13 DR 241.

<sup>1075</sup> Livingstone, n.635, at 355.

<sup>1076</sup> (1982) 4 EHHR 139.

<sup>1077</sup> Constitutional Court, sent. 11 December 2012 n. 301. The Court found the constitutional complaint inadmissible, as the required change in the law can only be enacted through a legislative act. The complaint referred to Art. 18 of the law on prison, providing that all prisoners' visits should be visually monitored by the prison staff. However, the Court, after noticing that changing this prescription is upon the legislature, also notices that even eliminating or limiting visual inspections during social visits, this would not automatically introduce the right to private visits in the Italian system. It would still be necessary for the legislative power to intervene, since the establishment of conjugal visitation programmes calls for an analysis of the balance between the need to maintain security in prison against the protection of prisoners' rights.

<sup>1078</sup> Andrea Pugiotto, 'Della castrazione di un diritto. La proibizione della sessualità in carcere come un problema di legalità costituzionale' (2019), *Giurisprudenza Penale* 2-bis. The necessity of a reform by act of Parliament has prevented other attempts to circumvent the legislature inertia. In 1999, the Director of Prison Service and the Undersecretary of Justice elaborated a review of Prison regulations that introduced the possibility for prisoners' family members to spend a maximum of 24 consecutive hours in housing units inside prisons without being monitored. However, even in that case the Appellate Administrative Court (*Consiglio di Stato*) deleted this norm from the final text, as only the legislative power can modify prison law in this area that addresses the intimate sphere of human personality and puts it at odds with penal treatment (*Consiglio di Stato*, opinion 17 April 2000 n. 61).

Most recently, a bill introduced by few regional Ombudsmen on the Rights of Persons deprived of their Liberty proposes to introduce a right to relate (*diritto all'affettività*) to integrate current legal provisions concerning prisoners' relationships with the family, based on the Constitutional Court encouraging reasoning. It should extend not only to the cohabiting partner, but also to relatives and friends. The bill prescribes one visit per month of minimum six and maximum 24 hours with persons authorised to social visits, in housing units properly equipped inside the penal institutions, without visual or audio surveillance.<sup>1079</sup> The bill will be presented by the Regional Ombudsmen to Regional Councils with the aim of forwarding it to Parliament for discussion.<sup>1080</sup>

### 6.5.3 Participants' observations on the right to private visits

The majority of my participants agreed with the positive effects conjugal visits would have for prison life. The fact that other countries already regulate such programmes was not unknown to interviewees and reinforced their view.<sup>1081</sup> Concita believed that not having “private rooms where people can have some privacy, having sex or also exchanging confidences with your female or male partner” represents a gap in the prison system. “It is a bodily need: the body needs sex as it needs to eat, drink, it's a need. I am honest, when I arrived to prison I told to the doctor: Miss, I need sex [she laughs].”<sup>1082</sup> It is fascinating how she re-appropriated the language of body and senses to explain what is a basic aspect of a person's life, similarly to what the Italian Constitutional Court stated, yet taking the issue back to its sexual dimension without shielding behind more ambiguous, or platonic, terms.

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<sup>1079</sup> Bill to introduce modifications to law 26 July 1975, n. 354 on the subject of “protection of intimate relationships of persons deprived of their liberty” (*Proposta di Legge: Modifiche alla legge 26 luglio 1975, n. 354 in materia di “tutela delle relazioni affettive intime delle persone detenute”*), at [<https://www.societadellaragione.it/2019/08/13/una-legge-per-laffettivita-in-carcere/>], accessed 9 December 2019.

<sup>1080</sup> The Italian Constitution stipulates that a legislative bill can be submitted to Parliament by various subjects, including Regional Councils as provided at Art. 121 Constitution. The strategy adopted by the Ombudsmen is particularly interesting, as previous bills on this issue have always been introduced by one or more members of Parliament. In this case, the chosen *iter* stresses the local dimension of the problem, which is widespread in all prisons over the territory, and seeks to involve those institutions representing the State that are in closer contact with Italian citizens, and should therefore be more familiar with problems affecting the territories under their competence. A number of proposals have been submitted to Parliament over the years to introduce private rooms, or the right of prisoners to require private visits. See e.g. legislative bill proposed by Senators Della Seta and Ferrante, 24 July 2012, n. 3420; legislative bill 13 June 1996, n. 1503; legislative bill 28 February 1997, n. 3331.

<sup>1081</sup> Interview with Vera, prisoner at UK-2 (27 February 2019): “I think we should have [conjugal visits], truthfully, I do. I do think it should happen here, it happens in other countries so why not here?” Interview with Elena, prisoner at ITA-3 (7 August 2018): “Eh, it would be difficult. I know that in other States there are similar situations [talking of conjugal visits] and I think it could also be a positive thing” (*Sì, eh, sarebbe difficile, so che in altri Paesi esistono delle situazioni del genere [visite coniugali] e secondo me potrebbe essere anche una cosa positiva*). Interview with Teresa, prisoner at ITA-3 (7 August 2018): “It would be a great idea, wonderful, to have private rooms where two people can meet” (*Sarebbe ottima come idea, favolosa, avere delle stanze private dove due persone si possono incontrare*).

<sup>1082</sup> Interview with Concita, prisoner at ITA-5 (27 February 2019) (*Io credo che manca questo nel carcere, delle stanze private dove puoi avere un po' di privacy o anche fare sesso o anche scambiarsi delle effusioni con la tua compagna o il tuo compagno. Manca, perché è un bisogno del corpo: Il corpo ha bisogno del sesso, come da mangiare, da bere, è un bisogno. Io sono sincera quando sono arrivata in prigione ho detto alla dottoressa: dottoressa, io ho bisogno di sesso*).

Fiona, on the other hand, used legal terms to say “in my opinion, it is a normal right, both for women who are with women and for men who are partnered with women, to have private rooms for conjugal visits.”<sup>1083</sup> Others pointed out that it does not have to be necessarily for sex. Once more, they offered a more complex conceptualisation of relationships than the one promoted by the prison norm: “Even if a person doesn’t want to have sex, but only hug someone or kiss, at least you can vent your lack of affection”,<sup>1084</sup> or they could just “having a coffee, a chat, a TV if they want to cuddle up with each other.”<sup>1085</sup>

According to Gloria, there would be less “filthiness” inside prisons,<sup>1086</sup> while Craig went back to what happens in cells and candidly affirmed that prison staff would probably oppose certain arrangements, but they are already happening in the cell.<sup>1087</sup>

However, interviewees gave more diversified answers regarding who should be admitted to conjugal visits. Vera highlighted that there should be proper controls to avoid visits being used for smuggling drugs or “passing stuff,” and should be linked with some form of incentive system, while Teresa reflected on the fact that contraceptives should be made available, particularly for heterosexual couples, and this could be a problem for prison staff.<sup>1088</sup> Riccardo believed it would be difficult to organise a private visitation programmes with the limited resources available,<sup>1089</sup> echoing what the Appellate Administrative Court in Italy described as the strong dichotomy between the theoretical rehabilitation model of a prison regulatory system providing for conjugal visits and the inadequacy of the prison in reality.<sup>1090</sup> However, it should be upon the State to fulfil the obligation to guarantee the equivalence of care and prisoners’ fundamental rights, without violating their prerogatives due to lack of appropriate resources.<sup>1091</sup>

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<sup>1083</sup> Interview with Fiona, prisoner at ITA-5 (27 February 2019) (*Per me sarebbe una cosa di diritto normale, sia per le donne che stanno con le donne, sia per gli uomini che stanno con le donne, avere delle stanze private per visite coniugali*).

<sup>1084</sup> Interview with Teresa, prisoner at ITA-3 (7 August 2018) (*anche se poi una persona non vuole fare sesso, ma vuole solo stare abbracciato a baciarsi però perlomeno riesci a sfogare questa carenza d'affetto*).

<sup>1085</sup> Interview with Craig, prisoner at UK-1 (28 November 2018): “Like I say having somewhere you can go, you know, a room, where having a coffee, a chat, a tv if they want to cuddle up with each other and watch TV and that’s I think prison should definitely think about things like that.”

<sup>1086</sup> Interview with Gloria, prisoner at ITA-3 (7 August 2018): “if there were private rooms there would be less filthiness” (*se ci fossero delle stanze private ci sarebbero molte meno sozzerie, sì*).

<sup>1087</sup> Interview with Craig, prisoner at UK-1 (28 November 2018): “I definitely think there should be a room where they can go for sometimes like between themselves. Ehm, now I know the big way the prison must say things like they might not want two prisoners...well it doesn’t really matter because it’s the same when you are in your cell.”

<sup>1088</sup> Interview with Vera, prisoner at UK-2 (27 February 2019): “I think it should be looked at correctly and in the right way because you wouldn’t like people passing stuff and stuff like that”. Interview with Teresa, prisoner at ITA-3 (7 August 2018): “I meant to say contraceptives. For me, there would definitely be no problem, but I don’t know about security” (*volevo dire anticoncezionali ecco. Sicuramente per me non ci sarebbe problema, ma per la sicurezza non lo so*).

<sup>1089</sup> Interview with Riccardo, prisoner at ITA-4 (22 August 2018): “How to handle it, how to handle the staff, I don’t know how it could be handled, it depends on how it would be managed [talking about private visitation programs]” (*Da gestire, la gestione del personale, non so come si possa gestire bisognerebbe vedere come viene gestita la cosa*).

<sup>1090</sup> Consiglio di Stato, opinion 17 April 2000 n. 61.

<sup>1091</sup> The EPR affirm that all necessary medical, surgical and psychiatric services including those available in the community shall be provided to each prisoner regardless of the prisoner’s legal situation (Rule 40). The Principle of normalisation is enshrined also in Rec (98) 7 of the Committee of Ministers to member states concerning the ethical and organisational aspects of health care in prison, which requires that “health policy in custody should be integrated into, and compatible with, national health policy.” The CPT’s 3rd General Report also lays great emphasis on the right of prisoners to equivalence of health care. According to Lines, the principle of equivalence of care does not correspond only

Interestingly, the interviewees applied a version of the heteronormative framing of relationships promoted by the prison system when they described who they thought should get access to the visitation scheme. Simon doubted that homosexual couples should benefit from it: “if you were heterosexual, it would be a little bit more... accepted, isn’t it? That you would want to sleep with your wife whatever. But again it’s still very strange for individuals to accept you being as gay, and two men together? Even in this day and age, it’s still difficult for heterosexual to understand the LGBT side of it.”<sup>1092</sup> Others referred to marriage as a condition to enjoy conjugal visits, while the majority of participants in favour of private visits believed that the interested couple should be stable, or should have cohabited before imprisonment to obtain permission to see their partner in private. Some linked it with the necessity to determine whether the relationship is consensual, while others were of the opinion that prison staff should be able to assess whether leaving the couple in a housing unit without surveillance would be appropriate for their safety.

In spite of the varied and fluid definitions they used to describe their orientations and identities, interviewees went back to a very traditional and static conceptualisation of the couple to categorise LGBTQ people through hierarchies. The Foucauldian dynamics of power representing sexuality were fully replicated by participants. Whereas many of them were more prone to subvert the sex negativity pyramid theorised by Gayle Rubin in relation to their definition of identity and behaviours, they were much less subversive or fluid when qualifying acceptable relationships, and they went even further in their analysis of security concerns and their individual rights. Clearly, some moral implications entered in their judgment.

#### 6.5.4 A “don’t ask don’t tell” approach to prisoners’ relationships

The regulatory framework described above gives rise to a number of issues, as detailed by my participants. Here, I do not differentiate between the data collected in England and in Italy, unless necessary, as participants’ accounts presented many similarities.

Prisoners initiate same-sex relationships, “it happens all the time”.<sup>1093</sup> Yet, participants are unanimously aware to different degrees of certainty about what prison rules stipulate, that a relationship between prisoners would constitute a punishable violation. “Sexuality is strictly forbidden”;<sup>1094</sup> “it is prohibited to have relationships in prison”;<sup>1095</sup> “if I have to be approached by someone as LGBT mentor, and asked if you could have a

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to a formal equivalence to health care provided in the community, as prisoners live in worse conditions than free people. Lines argues that States should aim at the equivalence of objectives between the prison and the outside community in terms of healthcare, meaning that the former can be higher than the latter. See Lines, n.921.

<sup>1092</sup> Interview with Simon, prisoner at UK-1 (28 November 2018).

<sup>1093</sup> Interview with Vera, prisoner at ITA-3 (7 August 2018).

<sup>1094</sup> Interview with Goliarda, prisoner at ITA-5 (28 August 2019) (*la sessualità è proibita*).

<sup>1095</sup> Interview with Cynthia, prisoner at UK-2 (27 February 2019).

relationship with X, Y, Z? I would probably discourage it, and told him to speak to an officer for safeguarding issues”;<sup>1096</sup> “it would mean going against all that the prison rules represent”.<sup>1097</sup>

These were not necessarily described in sexual terms. When asked what a relationship represents for them, participants provided different answers, such as “having someone you can go, a room, having a coffee, a chat, watch TV and cuddle up with each other if they want to”,<sup>1098</sup> or “having a platonic relationship” by corresponding with another prisoner, as explained by Teresa at ITA-3.

At ITA-5, I interviewed Fiona, a lesbian woman, and Andrea, a transgender male, who were in a relationship. They described their usual day in prison in a similar tenor as one could hear from a middle-class couple. Fiona had her first intimate experiences with women during her prison time, while Andrea came out in prison affirming his gender identity and was at the beginning of his transitioning process. Fiona enjoyed cooking, cleaning the cell and doing her chores, while Andrea used to go to work or participate in morning activities.<sup>1099</sup> Andrea was in love with Fiona, and decided to refuse to obtain home arrest – even if he was meeting the criteria to convert his prison sentence – in order not to leave Fiona inside.<sup>1100</sup> They also had sexual intercourse, wholly living their relationship, but the representation of their bond was clearly not limited to a sexual interest. It intersected with their personal exploration of sexuality and identity, which shifted from their first access into prison.

Members of staff allowed them to share the same cell together with two other inmates. Others were not so lucky. Some interviewees heard of prisoners in a same-sex relationship who were separated, one transferred to a different wing.<sup>1101</sup> However, Vera observed that separations may take place because one of the partners is more vulnerable than the other, while Drew distinguished between more troubling and quieter wings, noticing that in the latter case prison staff are more lenient towards same-sex couples sharing the same cell. In fact, Drew, Vera and Cynthia reported examples of prisoners in a relationship who were allowed to stay together in the same cell until they did not “push it [their relationship] into people’s face.”<sup>1102</sup>

Therefore, situations can vary, and prison management does not necessarily follow the Court’s approach to same-sex couples sharing a cell expressed in the *Hopkins v Sodexo* case.

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<sup>1096</sup> Interview with Simon, prisoner at UK-1 (28 November 2018).

<sup>1097</sup> Interview with Roman, prisoner at ITA-4 (22 August 2018) (*vorrebbe dire andare contro tutto quello che é il regolamento*).

<sup>1098</sup> Interview with Craig, prisoner at UK-1 (28 November 2018).

<sup>1099</sup> Interview with Fiona, prisoner at ITA-5 (27 August 2019): “I like to wake up, I like cooking, I like doing the chores in the cell, washing the clothes, I used to do anything on my own. And today, he had his first day of work and I boiled the water as he had to come back to eat” (*comunque io sono una che mi piace svegliarmi, mi piace cucinare, mi piace fare la cella, lavare i panni, facevo un po’ tutto io. E oggi aveva il suo primo giorno di lavoro e mi sono messa a mettere su l’acqua che doveva tornare per mangiare*).

<sup>1100</sup> Ibid: “He refused home arrests to not abandon me here inside” (*Ha rifiutato gli arresti domiciliari per non lasciarmi a me qua dentro*).

<sup>1101</sup> Interview with Cynthia, prisoner at UK-2 (27 February 2019): “They’ve done it to married couples in here. I don’t know if it’s a Governor’s decision or an officer’s decision. They have separated couples who came in here and they were married.”

<sup>1102</sup> Interview with Vera, prisoner at UK-2 (27 February 2019).

Discretion is a fundamental factor. It is actually possible to develop a relationship with a same-sex inmate until it is conducted with discretion and the prison staff do not catch the couple exchanging outpourings of affection.

Andrea was very direct in explaining the situation:

*“Prison rules do not really create an obstacle in my relationship with Fiona, because they placed us together [in the same cell], they know we are together. But of course [the staff] controls us, they go around at night to control if anyone tries to commit suicide, and if they catch you in the act...as it happened in the other wing, one of the girls has been sent to isolation.”<sup>1103</sup>*

This narrative came up various times from participants of both jurisdictions and at different prisons: relationships take place during imprisonment, and they are tolerated by the prison staff (sometimes even praised)<sup>1104</sup> until couples are “caught in the act” of engaging in some sort of physical activity, either in shared spaces or in their cells.<sup>1105</sup>

Furthermore, different unpredictable variables may enter into the frame: the type of sentence, which wing a prisoner is told to stay, the degree of acceptance and understanding from the prison staff, the availability of single or double cells in a given unit, and the list could go on.

This applies also to prisoners who entered in a relationship before imprisonment. Cynthia said:

*“Other officers, if they think you have a relationship they would split you up, one on one wing, one on another wing. They’ve done it to married couples in here. I don’t know if it’s a Governor’s decision or an officer’s decision. They have separated couples who came in here and they were married [...] it was just decided that it was against decency policy.”<sup>1106</sup>*

The situation appears to be less permissive in male prisons. William was not sure if same-sex relationships would be tolerated in a VPU, but he believed that the prison staff would intervene in the hypothesis of a break-up:

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<sup>1103</sup> Interview with Andrea, prisoner at ITA-5 (27 February 2019) (*Non è il regolamento [che crea delle difficoltà nel rapporto con lei], perché noi come ti ho detto ci hanno messo insieme [in cella], sanno che stiamo insieme. Però ovviamente loro [le guardie] fanno i giri, per controllare la notte se qualcuno s’ammazza, se qualcuno...e se ti dovessero beccare... com’è successo all’altro reparto, una ragazza l’hanno mandata in isolamento*).

<sup>1104</sup> Interview with Fiona, prisoner at ITA-5 (27 February 2019): “social workers had grown attached to my relationship with A, and they said ‘it seems to us something beautiful and clean’” (*gli assistenti si erano affezionati alla storia mia e di A che dicevano noi la vediamo una cosa pulita, una cosa bella*). Interestingly, the staff here appear to qualify relationships, deciding which ones are “acceptable” in their eyes. The question is how they develop these criteria, which seem very discretionary and based on personal values rather than on human rights or other codified principles.

<sup>1105</sup> See e.g. interview with Cynthia, prisoner at UK-2 (27 February 2019): “You are not supposed to have a relationship. I mean we will do, but you are not supposed to;” Gloria: “it’s not that you can do it in front of the staff” (*Ma poi non è che davanti alle assistenti puoi fa, io poi non sono tipo*); interview with Vera, prisoner at UK-2 (27 February 2019): “relationships, they know they happen but if you get caught you would get into trouble”; interview with William, prisoner at UK-1 (28 November 2018): “Yeah, as long as it is not blatant and open and coming to the attention...I think, in prison, as long as it is not causing problems, they’ll let you do it.” This approach is confirmed in the literature on prison sexuality: see Kunzel, n.194; Hensley, n.198.

<sup>1106</sup> Interview with Cynthia, prisoner at UK-2 (27 February 2019).



*“If you were in a relationship and the guy you are sharing a cell, and that relationship broke down, and there was animosity between the two of you, then the prison authority would probably step in, separate you and move you out.”*<sup>1107</sup>

Only transgender women in the special wing at ITA-3 described a situation where prolonged contacts with other prisoners were not possible at all. The deep isolation suffered by these inmates is formally justified by ensuring security and protecting transgender women from harassment and violence, but it ends up damaging their health, besides violating their human dignity. Not only can these prisoners cannot have sexual encounters with other inmates, but they cannot communicate or have any other contacts with other prisoners, while access to open air is limited.<sup>1108</sup> Prison rules applied in this way create an amount of distress and hardship “of an intensity exceeding the unavoidable level of suffering inherent in detention” that hinder prisoners’ wellbeing.

It is debatable that such conditions would trigger a violation of Art. 3 ECHR, considering the high threshold set in *X v Turkey* and *Stasi v France*. However, I would argue that this situation may be qualified as a predisposed bias on the part of the cisgender majority against a transgender minority, applying – *mutatis mutandis* – the ECtHR reasoning in *Identoba v Georgia*.<sup>1109</sup>

Elena clearly outlined the paradox of having a very small group of transgender women living in a male prison by explaining why in her opinion prohibiting relationships in a similar context makes sense:

*“If in a section of 200 men, you place 10 trans women, I don’t know, it becomes a dating game. That is embarrassing. In my opinion, this would not happen in a female prison.”*<sup>1110</sup>

Nevertheless, in spite of these obstacles, transgender prisoners still manage to entertain contacts with other cisgender inmates by taking advantage of some of the staff’s behaviour, when they “close an eye” on their communications and do not prevent them from enjoying brief meetings in common areas or exchanging letters. Elena even talked about one transgender woman I also met at ITA-3<sup>1111</sup> who was soon to get married with another cisgender male prisoner. Elena was puzzled: “they met each other in a way that I do not even know

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<sup>1107</sup> Interview with William, prisoner at UK-1 (28 November 2018).

<sup>1108</sup> Interview with Teresa, prisoner at ITA-3 (7 August 2018): “Inside, you cannot meet with other prisoners. Once a week there is the green area where you can talk to inmates, even if you are not supposed to. Personally, I breach the rule because it is the only recreational moment I have once a week” (*all’interno no [non ci si può vedere]. Una volta a settimana c’è l’area verde dove invece si può parlare con i detenuti anche se non si potrebbe. Personalmente trasgredisco alla regola perché è l’unico svago che ho una volta alla settimana*); interview with Elena, prisoner at ITA-3 (7 August 2018): “Actually, we should not have basically contacts with other prisoners, and they try to limit them to the minimum. I don’t know, in some way there are limited encounters anyway, like you cross way with someone once and you ask each other’s names, you start writing to each other” (*in realtà noi non dovremmo quasi avere contatti con gli altri detenuti, poi cercano di limitarli al minimo. Non lo so, in qualche modo però ci sono comunque incontri limitati, magari ti incroci una volta si chiede il nome, si inizia a scrivere*); interview with Silvia, prisoner at ITA-3 (7 August 2018): “They don’t let us talk with the boys, it is prohibited to have contacts and talk” (*dei ragazzi però non ci lasciano parlare con loro perché è proibito avere contatti e parlare*).

<sup>1109</sup> See Chapter 4.7.2.

<sup>1110</sup> Interview with Elena: “in una sezione di 200 uomini, se metti 10 trans, non so cosa diventa, il gioco delle coppie. La situazione che si crea è quella, è imbarazzante. Secondo me in un carcere femminile questo non avverrebbe”.

<sup>1111</sup> Unfortunately, she finally decided she did not want to be involved in this project.

how.”<sup>1112</sup> Yet, this reinforces the notion that relationships in prison can be more than only sex – as the law frames them – and opportunities to re-construct sexualities or identities can happen also within a relational dimension that manifests in different ways.

Although prison aims to replicate and monitor specific types of interpersonal exchanges by excluding “deviant” subjects from interacting with biologically determined ones, individuals can find ways to refer to the space and objects around them through differentiation from the paradigmatic norm, thus creating unexpected kinship, possibly even originating moments of resistance to the – so far – unquestioned dynamics of a certain community inhabiting a heavily regulated environment.<sup>1113</sup>

Breaking the repetition of the norm has consequences. Participants noticed same-sex couples were treated differently, with prison staff increasing surveillance towards these subjects: “they are always over you, you are more controlled when you are doing open air time, if you hug they look at you as to say ‘what are you doing?’”<sup>1114</sup>

These accounts mirror the impact of unclear prison regulations, but also reveal the downfalls of a managerial approach to sexuality and contacts among prisoners which does not appear to thoroughly assess the human rights implications of these choices, and is imbued with a combination of the sex negativity paradigm and of surveillance on “deviant” sexualities.<sup>1115</sup> Even the most understanding members of prison staff towards same-sex relationships cannot – due to managerial policies – or are not willing to tolerate public manifestations of affection. Contacts must remain private, hidden, to be acceptable.

This scenario raises a number of questions regarding the definition of (sexual) contacts, and the validity of justifying such prohibition to prevent episodes of sexual violence.

On the first issue, participants once again gave a picture of incoherent policies regarding which expressions of intimacy are permitted. They made repeated reference to avoiding exposing relationships in common areas. Discretion is connected to a concept of privacy which is valued also by a majority of the participants. However,

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<sup>1112</sup> Interview with Elena, prisoner at ITA-3 (7 August 2018) (*Ci sono due persone qua in carcere che si stanno sposando però si sono conosciuti in un modo che non so neanche come*).

<sup>1113</sup> Ahmed, n.29, at 79-92; Dalton, n.11.

<sup>1114</sup> Interview with Alessia, prisoner at ITA-5 (28 August 2018) (*Le guardie ti stanno più addosso, quando stai all'aria sei più controllato, e se magari te abbracci ti guardano come a di': che stai a fare?*) Sara said something similar: “some assistants see you and...they don't say anything, but their face, the way they look at you it is like they are mistreating you, it is wrong” (*ci sono invece assistenti che ti vedono e...non dicono niente eh, per carità di Dio, però la faccia, lo sguardo come ti guardano è come se ti maltrattassero, non va bene, secondo me è sbagliato*). Interview with Sara, prisoner at ITA-4 (22 August 2018). Kimberley complained that she made friends in prison, but she was accused of “being in a relationship by staff even when you are not and it's clearly friendships”, interview with Kimberley, prisoner at UK-2 (27 February 2019). It is however difficult to understand whether these are general practices linked with a prisoner's gender identity or sexual orientation, or whether episodes like these are isolated to certain staff only, or are related to other issues specific to the dynamics between a member of staff and a certain participant. That is also why having laws and policies finally addressing more clearly and in a more realistic and inclusive way sexuality and relationships in prison at the international and national level would be extremely beneficial to improve prisoners' life conditions.

<sup>1115</sup> On the importance of a human rights-based approach on prison management, see Whitty, n.645; Lazarus, n.164.

being discreet may imply “not kissing”,<sup>1116</sup> or being targeted because someone is kissing their partner;<sup>1117</sup> avoiding hugging another inmate of the same sex because it annoys other prisoners;<sup>1118</sup> as mentioned before, transgender women in male prisons cannot even talk to cisgender men.

This pressure can come from the staff, but also from other prisoners. Consequently, the “don’t ask, don’t tell” policy makes the cell the central space where prisoners seek to express their feelings.

#### 6.5.5 The centrality of the cell as a relational space inside prison

In a setting where prisoners are located in different wings or placed in isolated special sections,<sup>1119</sup> the cell becomes a core space of interaction. Craig highlighted it when discussing the possibility of starting a relationship: “I didn’t see the point, as we weren’t cellmates, so the only time we got to see each other was a couple of hours a day on the exercise.”<sup>1120</sup>

Female participants described above how a relationship can develop when two women share the same cell and the prison staff do not oppose the arrangement. It aligns with some of the participants’ search for privacy, as many of them like to “hav[e] one away from people”<sup>1121</sup> and it helps satisfying “their needs”.<sup>1122</sup> However, it is essential to this dynamic that there are no other prisoners in the cell, or that the latter would agree to be cooperative when the couple wish to have sexual intercourse.

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<sup>1116</sup> Interview with Vera, prisoner at UK-2 (27 February 2019): “Don’t walk around kissing, but these happen everybody sees it, that’s what the rule is for because it is not right for other people who cannot have relationships”. Here, Vera agrees with the prison policy, by linking it with respect of other people’s privacy, and how painful it could be for prisoners with their partners outside. This highlights the inadequacy of the current prison organisation and structure to deal with prisoners’ basic needs, which results in harm not only for the “deviant” minority, but also for the “accepted” sexual subjects.

<sup>1117</sup> Interview with Craig, prisoner at UK-1 (28 November 2018): “They got caught kissing, not by staff, by other prisoners, and it got around the wing. Apparently they didn’t really have any problems, just people going around saying ‘we’ve seen two people kissing’.”

<sup>1118</sup> Interview with Alessia, prisoner at ITA-5 (28 August 2018): “If I want to talk to you and hug my girlfriend, I don’t have to hold back if you are uncomfortable, that’s your problem” (*Se io voglio stare a parlare con te e abbracciare la mia ragazza, non devo stare a guardare che tu sei in imbarazzo, é un problema tuo*).

<sup>1119</sup> Interview with Roman, prisoner at ITA-4 (22 August 2018): “It is hard [that sexual relations take place between a heterosexual and homosexual man, or between heterosexuals], first because of the floors, second for reasons of space, which is limited” (*Difficile [che nascano rapporti sessuali tra eterosessuale e omosessuale, o tra eterosessuali], primo per i piani, secondo per motivi di spazio, che sono quelli limitati*).

<sup>1120</sup> Interview with Craig, prisoner at UK-1 (28 November 2018). Craig added: “if I get along with a lad who lives in the same cell that would be much easier. Plus, we would be able to have a proper relationship”. William also underlined the possibility to entertain a relationship by two prisoners hosted in the same cell, although he never witnessed it happening: “There were two gay lads, they were sharing a cell. As I said, nothing happened, but...they could have done. If they had fancied each other, maybe it could have happened, and I don’t know what the prison would have done about that. I mean, I don’t know whether they would have swapped, or moved of cell, but at the end of the day...”

<sup>1121</sup> Interview with Cynthia, prisoner at UK-2 (27 February 2019).

<sup>1122</sup> Interview with Alessia, prisoner at ITA-5 (28 August 2018): “Of course, a little more privacy wouldn’t hurt, because you have needs anyway, I need a space” (*certo un po’ più de privacy non sarebbe male, perché comunque c’hai dei bisogni, io devo avere uno spazio*).

Concita observed that if a prisoner were in a single or double cell, it could be possible to “do something”, but this is much more difficult in wings where four people stay in the same cell.<sup>1123</sup> In this case, prisoners can wait when the other occupants of the cell have a shower or leave to spend their association time;<sup>1124</sup> otherwise they should depend on the cellmate’s willingness to leave the cell. Some are so cooperative that they stand guard to tell if any staff member is approaching.<sup>1125</sup>

Sexuality is therefore lived through constant negotiation, by playing with blurred boundaries between what is formally inadmissible and informally accepted, and between couples and other prisoners’ privacy.<sup>1126</sup>

However, long-sentenced participants underlined that in the past, prison staff were even less accepting:

*“Now you can sit on somebody’s bed, and you can sit on the bed cross-legged and it doesn’t matter. You can hug somebody to say ‘morning’. Years ago, they used to have a special charge for lesbian activity, and that could be anything, from having sex with someone, to putting your arm around a leg. The rule was: if you sat on somebody’s bed, you have to have one foot on the floor. And if you didn’t have a foot flat on the floor, they nicked you away (slang for punish you).”<sup>1127</sup>*

This account powerfully reveals the historic cycle of discrimination and violence suffered by LGBTQ people during imprisonment, and the inherent homophobic intent of prison policies around sexuality.<sup>1128</sup> It certainly provides evidence of the progress made through time, yet it also shows the perpetual lack of in-depth reflection on the cruelty of such policies, whose normative foundations are fuelled by repetition of similar practices even if slightly more permissive.

Ultimately, sex prohibition policies, formally designed to prevent non-consensual sexual activity, do not effectively tackle forms of abuse and have relevant consequences on prisoners’ lives.

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<sup>1123</sup> Interview with Concita, prisoner at ITA-5 (22 August 2018): “Because there is a little more privacy in single or double cells, for “dorms” I suppose it is practically impossible. As they are four, in double cells there are two people, how can you do anything??” (*Perche' c'è un po' più de privacy in cellulare [intende dire nelle celle singole o da due], per le camerate suppongo che sia praticamente impossibile. Perché sono in quattro, in cellulare invece sono in due, come si può fare qualcosa, no?*) Alessia remembered that an inmate who has lived at Rebibbia for years told her that there was more privacy in the past, and in the single or double cells cellmates were also allowed to join beds together, thus creating a double bed. (*mi diceva una vecchia carcerata che prima c'era un po' più di privacy, nel senso che se non sbagli i cellulari univano i letti matrimoniali. Univano i letti e stavano insieme, comunque le guardie lo sanno*).

<sup>1124</sup> Interview with Simon, prisoner at UK-1 (28 November 2018).

<sup>1125</sup> Interview with Goliarda, prisoner at ITA-5 (28 August 2018): “other times cellmates help you telling when the officers are approaching, but the problem is that if they find out they are sanctioned” (altre volte le compagne di cella aiutano dicendo quando le guardie arrivano o meno, però il problema è che se vengono scoperte c'è una punizione).

<sup>1126</sup> Alessia said, for example: “Once you know the time when [prison staff] passes by, you are together with her in the cell, and it is a deal [to have sex]. Anyway, you know that they come – let’s say – every two hours? You wait for two hours, and you do what you have to do. Surely, it is hard when you are in different cells” (*Una volta che sai gli orari, quando passano, poi comunque ce l’hai in cella insieme. E’ fatta [per fare sesso]. Comunque sai che passano per dire, ogni due ore? Aspetti due ore, fai quello che devi fare. Certo, quando sei in celle diverse è difficile*).

<sup>1127</sup> Interview with Cynthia, prisoner at UK-2 (27 February 2019).

<sup>1128</sup> In this sense, the accounts confirm what is argued by Dunn (n.133), as well as a key argument of queer criminology.

### 6.5.6 The “don’t ask don’t tell” approach and the perpetuation of violence and abuse in prison

Previous sections have illustrated that contacts are accepted to the point that they do not become visible, so as not to compromise “decency”.<sup>1129</sup> Many interviewees agreed with this view, but they also believed that prison management could be more relaxed in this regard when privacy is respected.<sup>1130</sup>

Only a few interviewees posed the problem of violence or lack of consent as a factor to be weighed against permitting sexual activity to take place among prisoners. At ITA-3, Silvia explicitly stated that there is no risk of becoming victim of sexual violence “if you are respectful”, a sentence with implications in terms of what respect means in the prison institutional discourse, and to whom.<sup>1131</sup>

On the other hand, Vera talked about the positive aspect of having a rule prohibiting sex in prison by saying:

*“there are bad relationships as well, so they have to be monitored very carefully. There’s a lot of vulnerable people that can get preyed on, and so I think that staff should be aware if things are happening, just pick something out, maybe not doing it because the relationship may conceal that someone is vulnerable?”*<sup>1132</sup>

Cynthia accepted that some prison relationships can be violent, while observing at the same time that sexual violence should be addressed by using similar strategies as developed outside:

*“There could be ways to understand if a relationship is authentic or violent, the same way as they would on the out. Because you get women I’ve met on the out that get into violent relationships and suffer abuse within a same-sex relationship or opposite sex relationship. It happens everywhere. So if they find a way of finding out who is in a bad relationship or in a healthy relationship, then why not [allowing the healthy one]?”*<sup>1133</sup>

Kimberley was the only interviewee to share her personal experience of sexual abuse when she was initially hosted in a male prison, clearly stressing the higher risks she faced as a transgender woman in a male setting: “In a male prison people would take advantage of you and you are like sexually exploited. And all the abuse, they attack you for no reason, and it is like, not safe.”<sup>1134</sup> This description represents a case of (trans)gender-

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<sup>1129</sup> Interview with Simon, prisoner at UK-1 (28 November 2018): “And again, it’s not something that I think the prison population on this wing should be ...should be seeing [prisoners having sex]. It’s just not...you wouldn’t do it on the out, so...why do it in here?”, interview with Craig, prisoner at UK-1 (28 November 2018): “I know they go for hours when the dorm, for about until 8 until the hours in the morning, and I don’t think that would be fair on the staff to see two people sleeping together or even having sex.”

<sup>1130</sup> Interview with Drew, prisoner at UK-2 (27 February 2019): “I think that it could be a little bit more relaxed. Say they made it a little bit more flexible and you want some together time with your partner. As long as you keep that together time as private as possible so that you are not offending anybody, that I don’t see the harm in it.”

<sup>1131</sup> Interview with Silvia, prisoner at ITA-3 (7 August 2018) (*No no, c’è il rischio di violenza sessuale, basta che tu dia rispetto*).

<sup>1132</sup> Interview with Vera, prisoner at UK-2 (27 February 2019).

<sup>1133</sup> Interview with Cynthia, prisoner at UK-2 (27 February 2019).

<sup>1134</sup> Interview with Kimberley, prisoner at UK-2 (27 February 2019). Kimberley’s account echoes the literature exploration of the carceral space as a site of violence originated by gendered dynamics of power: see e.g. Stanley, n.62; Ristroph, n.185.

based violence (GBV), which in the definition of CEDAW is “violence that is directed against a woman because she is a woman or that affects women disproportionately.”<sup>1135</sup> Over the years, GBV came to include reference to “violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering, against someone based on gender discrimination, gender role expectations and/or gender stereotypes, or based on the differential power status linked to gender.”<sup>1136</sup>

The doubt remains that rules like the “night exception” in the UK, or a general strictness in public manifestations of affection in both jurisdictions, favour a tendency to hide these connections for fear of being sanctioned, ultimately making it harder for State authorities to detect abusive relationships. It also obstructs a deeper analysis and deconstruction of the stereotypical forms of masculinity which facilitate violent behaviour.

It makes it equally difficult to identify and eradicate forms of sex work within the wings, or as Goliarda called it, “having sex to trade favours”.<sup>1137</sup> Riccardo talked expressly of men who have sex with men (homosexual or of other sexual orientations) to have “an economic gain.”<sup>1138</sup> These practices may amount to acts of sexual violence based on traffic and coercion;<sup>1139</sup> they spread more easily in inherently unequal environment based on a normative paradigm supporting stereotypical notions of masculinity and femininity, which does not tackle intersectional disparities of class, nationality, sexuality and gender.<sup>1140</sup>

Serious inability by the State to comply with the obligation to protect individuals from SGBV intersects with other human rights violations, such as the prohibition of torture, inhuman or degrading treatment, the individuals’ right to privacy, and their right to life, liberty and security of the person.

The sex prohibition policy and the vagueness of its application, along with the lack of clear definitions of what activities are deemed admissible lead to a scenario where it is extremely difficult for prisoners and staff to

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<sup>1135</sup> Committee on the Elimination of Discrimination against Women, General Recommendation No. 19 on Violence against women, A/47/38 (1992), [[https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1\\_Global/INT\\_CEDAW\\_GEC\\_3731\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf)], accessed 9 December 2019, par. 6.

<sup>1136</sup> UN Women, *Virtual Knowledge Centre to End Violence Against Women and Girls*, [<http://www.endvawnow.org/en/articles/347-glossary-of-terms-from-programming-essentials-and-monitoring-and-evaluation-sections.html>]. The situation of transgender inmates MTF presents similar risks as those suffered by women detained in places of confinement where the majority of inmates and staff are males. The CEDAW found that being subject to sexual harassment and degrading treatment by reason of one’s gender amounts to a human rights violation and a breach of the CEDAW convention, in a case where the applicant was held in a detention centre staffed completely by men, who touched her inappropriately, while a staff member conducted a body search by stripping the applicant of her clothes. See CEDAW, *Ingrid Abramova v Belarus*, Communication No. 23/2009 (27 September 2011).

<sup>1137</sup> Interview with Goliarda, prisoner at ITA-5 (28 August 2018) (*alcune persone lo fanno più che altro per passare il tempo e per convenienza*).

<sup>1138</sup> Interview with Riccardo, prisoner at ITA-4 (22 August 2018) (*fare sesso perchè poi dopo hanno un ritorno economico di qualche tipo*).

<sup>1139</sup> Sexual violence has been defined as “a form of gender-based violence and encompasses any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed against a person’s sexuality using coercion, by any person regardless of their relationship to the victim, in any setting.” UN Office of the High Commissioner for Human Rights, *Sexual and gender-based violence in the context of transitional justice*, October 2014, [[https://www.ohchr.org/Documents/Issues/Women/WRGS/OnePagers/Sexual\\_and\\_gender-based\\_violence.pdf](https://www.ohchr.org/Documents/Issues/Women/WRGS/OnePagers/Sexual_and_gender-based_violence.pdf)].

<sup>1140</sup> See e.g. Organisation for Security and Cooperation in Europe (OSCE), *Preventing and Addressing Sexual and Gender-Based Violence in Places of Deprivation of Liberty. Standards, Approaches and Examples from the OSCE Region*, OSCE/ODIHR 2019.

distinguish between consensual and non-consensual relationships. Furthermore, prisoners are not encouraged to denounce eventual abuses as they risk being disciplined or reprimanded, in ways that are as unclear as the principles regulating prison sexuality.

#### 6.5.7 Disciplinary sanctions or reprimands: an uncertain framework that can impair prisoners' rehabilitation

Prison staff's approach to sexuality and relationships among same-sex prisoners is ambiguous at best.

Staff are more accepting of relationships or sexual conducts happening out of anyone's sight, and tend to tolerate relationships that appear to be stable. Stability does not automatically entail that couples are allowed to share the same cell, but it should at least facilitate inter-wing visits in case prisoners are placed in separate areas of the estate.<sup>1141</sup>

Nevertheless, not all couples' bonds of affection are tolerated without disciplinary actions. Participants talked of three main types of sanctions: isolation in the prisoner's cell with the consequent impossibility of attending activities and enjoying open air; separation of prisoners who were engaging in intimate contacts; loss of privileges linked with sentence reduction for good behaviour. Higher surveillance of inmates who are suspected – or have been proven – to be in a relationship has also been mentioned.

Different sanctions can be attached to different forms of contacts, but what the prison management considers "intimate contact" is almost impossible to determine precisely. For instance, according to Cynthia, if a member of staff surprised two prisoners watching TV inside the cell, laying on the same bed and "with somebody's head on my leg", that would not be permitted.<sup>1142</sup>

Consequences can be very serious: isolation can be prescribed as disciplinary action after some form of adjudication. The prisoner would be relegated to their cell without possibility of leaving it. Their "telly" and "a little bit of money" could be taken away.<sup>1143</sup> For inmates who are not spending a long sentence in prison, besides preventing the prisoner from enjoying association time, Cynthia also mentioned the risk of losing privileges, such as the detraction of days that count as reduction of sentenced prison time for good behaviour. A similar consequence was reported also by Alessia at ITA-5.<sup>1144</sup>

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<sup>1141</sup> Interview with Vera, prisoner at UK-2 (27 February 2019): "I think 'cos different Governors, one after another, and then one Governor comes in but I am not really bothered by it, I watched people who have been in a relationship and are in separate wings, who have been in a long-term relationship, and then like let visiting each other in the wing, so they let that happen. But it's not just someone you met five minutes ago, they've been in a long-term relationship."

<sup>1142</sup> Interview with Cynthia, prisoner at UK-2 (27 February 2019): "So as long as you keep it like above the line, I don't see why not. But if the officers walked in a cell and I had somebody head on my leg, I would caught watching telly...big no no."

<sup>1143</sup> Interview with Vera, prisoner at UK-2 (27 February 2019).

<sup>1144</sup> Interview with Alessia, prisoner at ITA-5 (28 August 2018): "if they find you, you get three days in isolation and they erase your 45 days for early release" (*se ti beccano hai tre giorni di isolamento e ti levano i 45 giorni [per la liberazione anticipata]*).

The separation of prisoners who are in a relationship can happen if they are found engaging in same-sex sexual or intimate contacts, but also as a pre-emptive measure before imprisonment:

*“If they think you have a relationship they would split you up, one on one wing, one on another wing. They’ve done it to married couples in here. I don’t know if it’s a Governor’s decision or an officer’s decision. They have separated couples who came in here and they were married.”*<sup>1145</sup>

Andrea described the case of a prison officer who had seen two inmates together in bed during the night shift, just sleeping: after stating “You make me sick!”, the day after they were moved into different wings. However, the management later reversed the decision and allowed them to share the cell again.<sup>1146</sup>

Specific circumstances may require keeping same-sex partners separate by reason of their past relational history, or for the nature of the crime they have committed, but the seeming randomness of such decisions, and the inherent or explicit homophobic connotations which are sometimes at the basis of such choices create a sense of injustice, pain and frustration looming upon prisoners.

Indeed, a number of participants lamented the contradiction behind these rules and their application. They were concerned that they did not have in-depth knowledge of the content and meaning of prison policies: “I would need to know the rules, if we are allowed to have relationships, I mean even for protection as well, you know I want to know the rules of prison, like for protection and that.”<sup>1147</sup>

Kimberley was vocal in stating: “prison instructions contradict each other. So it’s just like madness, one says one thing and the other says another, but none of them give examples of anything.”<sup>1148</sup>

Sanctions for having sexual intercourse are generally harsher. Punishment consists of a certain number of days in segregation and the loss of the requirements to obtain early release for good behaviour. For instance, Elena at ITA-3 said that “having sexual intercourse with another prisoner is sanctioned with 15 days of segregation and a disciplinary report, which affects my early release for good behaviour, every six months.”<sup>1149</sup> Alessia

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<sup>1145</sup> Interview with Cynthia, prisoner at UK-2 (27 February 2019).

<sup>1146</sup> Interview with Andrea, prisoner at ITA-5 (28 August 2018): “Once a friend of mine who is now on the third floor, she was simply staying in bed with another girl without doing anything, when an assistant passed by – she turned on the light “you make me sick, you make me sick, you make me sick!” she said, and they were separated, one on the second floor and one on the third floor. But they later were put back in cell together upon their request’ (*Una volta è successo che c’era una mia amica che adesso sta al terzo, stava al secondo piano, stava semplicemente dentro al letto con una ragazza senza fare niente, un’assistente è passata – col blindo chiuso loro stavano – ha acceso la luce: “che schifo, mi fate schifo, mi fate schifo!” le hanno divise di cella, una l’hanno lasciata al secondo e una al terzo. Però queste ragazze erano andate giù e poi si sono fatte rimettere in cella insieme, le hanno rimesse in cella insieme*).

<sup>1147</sup> Interview with Craig, prisoner at UK-1 (28 November 2018).

<sup>1148</sup> Interview with Kimberley, prisoner at UK-2 (27 February 2019).

<sup>1149</sup> Interview with Elena, prisoner at ITA-3 (7 August 2018): Elena refers in the quote to days counting for early release every six months. She is talking about the system to calculate early release, which is an institution provided for prisoners who well behave in prison and provide for a “deduction of 45 days for each semester of time served” (*All’interno di un carcere la relazione è vietata. Se io ho un rapporto sessuale con un altro detenuto mi faccio 15 giorni di isolamento e prendo un rapporto disciplinare, che ogni 6 mesi mi vale dei giorni di buona condotta.*). Law 663 / 1986 clarified how this deduction should be calculated: “the judge should evaluate the request for early release by considering each semester of time served, either they are assessed with separate rulings or with a single court order, in any case with the possibility of adopting different rulings for each semester.” See Mario Canepa, Alberto Marcheselli, Sergio Merlo, *Lezioni di diritto penitenziario* (Giuffrè editore, Milano 2002), at 153.



talked instead of “receiving a disciplinary report for indecent behaviour”, being sanctioned to “three days of segregation” and the loss of days that should be counted for the reduction of sentence for early release.<sup>1150</sup> It is unclear whether the different duration of the segregation time depends on different prison policies, or on the fact that the two participants were referring to different acts, or if there is a differential treatment in place for transgender prisoners in male prisons.

Certainly, this represents a particularly strict punishment that compromises inmates’ rehabilitation and release, without the management assessing the consensual or non-consensual nature of the act itself, or the proportionality of the measure.

Participants highlighted how the gravity of the act and the severity of the sanction can vary depending on cultural factors, such as staff or the Governor’s awareness and acceptance of SOGI issues.<sup>1151</sup> This confirms the negative impact of the organisational power of prison intersecting with individual assumptions rooted in a culture of sex negativity which is not properly addressed during staff training, and disproportionately affects LGBTQ prisoners.

#### 6.5.8 Hierarchies within LGBTQ prison minorities

Prison staff and management are not the only groups that can be influenced by gender and sexuality stereotypes. Personal beliefs and the influence of prison power dynamics have repercussions also on the way prisoners relate to – and value – someone who expresses queer identities or behaviours. A model based on surveillance and on the reinforcement of gendered and heteronormative sexual norms fuels dynamics that establish marginalised categories within groups who already represent a minority within prison. This emerged more frequently in accounts of participants hosted in male prisons, where segregation and masculine-based verbal and physical violence are more widespread.

Goffman considers the establishment of internal subhierarchies within marginalised groups of prisoners the consequence of the organisation of the penal estate as a closed environment, which ends up elaborating a

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<sup>1150</sup> Interview with Alessia, prisoner at ITA-5 (28 August 2018) (*Parte il rapporto disciplinare, perché primo: trasgredisci le regole del carcere, hai tre giorni di isolamento e ti levano i 45 giorni*). Elena and Alessia referred here to the mechanism of early release (*liberazione anticipata*) provided by the Italian Law on Prison (n.394) as reformed in 2018 at Art. 54. Early release is accessible to convicted people who have demonstrated to have actively participated to rehabilitation activities, and is provided to prisoners who have behaved correctly during their sentence. Therefore, disciplinary sanctions can lead to revoke this incentive. As noted by Perotti, prisoners who are hosted in penal institutions where rehabilitation programs are very limited or badly organised can more easily obtain early release, since the participation to rehabilitation programs corresponds in practice to not having any negative disciplinary reports. On the contrary, in prisons where rehabilitation strategies are more effective, the applicant shall demonstrate to have actively participated and benefitted from the activities offered. See Roberto Perotti, ‘La Liberazione Anticipata’ (2006), *L’altro diritto - Centro di documentazione su carcere, devianza e marginalità*, at [<http://www.altrodiritto.unifi.it/sportell/liberant.htm>], accessed 12 August 2019. See also Law on Prison, Art. 54.

<sup>1151</sup> Interview with Andrea, n.1148.

peculiar language and set of values.<sup>1152</sup> Others focus on the use of homosexuality as an instrument to create a system of power and control within a framework that rejects diverse expressions of sexualities.<sup>1153</sup>

These phenomena can be detected in the participants' narratives:

*“There is much envy in a similar context, and much jealousy between inmates. There is a lot of competition, of rivalry, among homosexual people. ‘Ah, I am the perfect homosexual because I have a partner outside and a life outside, but you, you are a failed homosexual because you don’t have anything outside and therefore neither you do inside, and so there is no point in you talking. This homosexual is not too flashy, on the contrary the less flashy the better, everyone would want him like that.’”<sup>1154</sup>*

The intersectional component of this description is striking: on one side, there emerges a clash between those inmates who have a social and economic network outside against those who do not enjoy such stability, which seems a crucial problem not only post-release, but also during imprisonment. On the other hand, a socio-economic commentary frames the core critique of how a homosexual life worth living looks. The “perfect” homosexual resembles an ordinary man with a partner and a family, but above all, who can “pass for” a heterosexual man.<sup>1155</sup>

This aspiration to “normalcy” can be traced also in Elena’s world representing the dynamics typical of ITA-3 transgender unit:

*“In male prisons you can have wars between ethnic groups, and situations that are very different from the ones we have on our floor. And then we also fight in little groups, between ethnic groups, but with dynamics and ways that are very different. [We] all hardly get along well in a section like this, but there are some elements that are part of the transsexual dimension, there are some people who tend to exaggerate in their desire to be noticed, and in having – let’s say – feelings of envy and jealousy towards other people stronger than others.”<sup>1156</sup>*

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<sup>1152</sup> Goffman, n.165.

<sup>1153</sup> Kunselman and others, n.207.

<sup>1154</sup> Interview with Roman, prisoner at ITA-4 (22 August 2018) (*In un contesto del genere ci sono molte invidie e molte gelosie tra detenuti. C’è una competizione, una rivalità: ‘ah, io sono un omosessuale perfetto, perché io ho il compagno fuori ho una vita fuori, tu sei un omosessuale fallito perché non hai niente fuori e quindi non hai neanche niente qua dentro, quindi è inutile che parli’. Non troppo appariscente, anzi, meno evidente è meno meglio è quindi lo vorrebbero tutti così*). Riccardo described “the envy which is present in the gay world at the prison level” as depending on the fact that someone else has “more money, better clothes, if he has someone who come visit him, a partner, is someone comes often to visit him, it is very much sensed regarding gay people.” Once more, it seems that lines are drawn from a combination of class differences, way of living homosexuality, and jealousy against prisoners who have partners ultimately due to loneliness. (*Se uno ha qualche cosa più dell’altro ha tantissima invidia. Se ha più soldi, se ha i vestiti belli, se ha qualcheduno che viene a trovarlo, se ha un compagno, se uno viene molto, viene molto sentita questa cosa per quanto riguarda i gay*).

<sup>1155</sup> On the concept of assimilationism and homonormativity see Duggan, n.100.

<sup>1156</sup> Interview with Elena, prisoner at ITA-3 (7 August 2018) (*Nelle carceri maschili ci possono essere le guerre tra etnie, cioè sono situazioni diversissime di quello che abbiamo sul piano noi, e allora si litiga tra etnie, si litiga tra gruppetti, tra fazioni, però con dinamiche molto diverse di quelle che ci sono qua, con dinamiche e modalità differenti. Sono dinamiche comunque anche un po’ naturali, difficilmente tutti vanno d’accordo con tutti in una sezione del genere, ma ci sono elementi nella dimensione transessuale, ci sono delle persone che esagerano un po’ nel voler apparire nell’avere questi diciamo sentimenti di invidia e di gelosia verso le altre persone più forti di altri*).

In this account, people who tend to overpass the boundaries of discretion and act in an excessively showy manner are identified as disruptive elements within the transgender prison community. However, also in this case gender identity intersects with other characteristics, the most conspicuous being the ethnic divisions within the unit. The different dynamics qualifying relationships between transgender prisoners create a more confrontational climate, particularly in a restricted environment, where flashy appearances and attitudes do not help in defusing such tensions.

The dichotomy between “acceptable” sexualities and contested ones within the LGBTQ prison population manifests in various combinations. Judging from participants’ narratives, flirting among prisoners is quite common, particularly in female prisons where inmates are not separated based on their SOGI.<sup>1157</sup> However, more flamboyant male inmates were labelled “faggots” in many instances.

There was less tolerance for prisoners who have sex with persons of the same sex without identifying as homosexual or lesbian.

Individuals who saw their prison sentence as an opportunity to experiment, or to re-orientate their sexuality,<sup>1158</sup> were often labelled as “curious:” “I think some of them are curious, or maybe they are, they are just not 100% sure, so they experiment to find out whether they are or not” Drew shared with me.<sup>1159</sup>

Elena said that from her personal experience “there are many people who define themselves as heterosexual, but in reality they are ‘gay-curious’, and they end up in situations where they relate to homosexual persons in various ways, but if you asked them, they say they are heterosexual.”<sup>1160</sup>

Roman used the label of “hetero-curious” to refer to men who are placed in the main wing along with heterosexual inmates, including also those subjects who realise to be homosexual after imprisonment, and start getting attracted by other prisoners of the same sex who flirt with them. Roman conflated them with bisexual men during the interview. Instead, Simon called inmates who do not declare themselves homosexual, but have sex with men inside prison, as “jail gays;” according to him, they are usually located with the general population.<sup>1161</sup>

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<sup>1157</sup> Interview with Gloria, prisoner at ITA-5 (28 August 2018): “just saying, if a girl is with me, for example if we are sitting together smoking a cigarette, I feel they are breathing down my neck, really” (*per dirti, se una ragazza sta insieme a me per dirte sedute insieme a fumarse una sigaretta, cioè me sento proprio l'aria al collo, in poche parole*). Interview with Fiona, prisoner at ITA-5 (28 August 2018): “she used to walk by and look at me, and I was looking back at her” (*questa passava e me guardava, io ricambiavo lo sguardo*). Interview with Alessia, prisoner at ITA-5 (28 August 2018): “Then perhaps you start caressing her, perhaps preparing coffee in the morning, or you show interest in her, or you show you are worried if perhaps she fights with someone else and you say “oh wait, what is happening?” (*Poi magari gli cominci a fare la carezza, magari a preparare il caffè alla mattina o te interessi a lei o te preoccupi se magari litiga e magari dici “O fermo ma che succede?”*).

<sup>1158</sup> Ahmed, n.29.

<sup>1159</sup> Interview with Drew, prisoner at UK-2 (27 February 2019).

<sup>1160</sup> Interview with Elena, prisoner at ITA-3 (7 August 2018) (*Ci sono tante persone che si definiscono eterosessuali e poi in realtà sono magari gay curiosi, che poi si imbattano in situazioni, o a relazionarsi con persone omosessuali o situazioni di vario genere, però se glielo chiedi ti dicono che loro sono eterosessuali, ce ne sono moltissime*).

<sup>1161</sup> Interview with Simon, prisoner at UK-1 (28 November 2018): “we’ve had a jail gay before, it happens that friends send them over in the main, and if that’s the case they obviously keep it for themselves, it’s just...it is purely sex, nothing else. Not the fact that they identify as being gay, just look I’m bored, I’m prison, I need to do something, it’s something

Participants believed this happens for two main reasons: some mentioned boredom and/or missing having sex, so they adapt to the gender binary prison system;<sup>1162</sup> others, particularly regarding female prisons, explained it as a mechanism to fight loneliness and get comfort.<sup>1163</sup>

Overall, participants described these persons experimenting with their sexuality with generally negative connotations. Cynthia asserted that “the majority of the relationships that you see in prison are people who are not truly gay” and that these women “do not have manners [...] they don’t care to start snogging in the middle of the corridor. They are less private and they do things that may be offensive too.”<sup>1164</sup> She was resentful that they did not seem to care about the consequences of their actions for the “truly gay” inmates like her, who when having a relationship in prison would keep it private.

Others, like Gloria, questioned the ethics of it, as “these persons enter prison and they have a husband outside, and children, and then they come here and they stay with the girls.”<sup>1165</sup>

Interestingly, participants often indulged into critiquing jail homosexuals by contrasting each other’s behaviour, and their approach to relationships. In this narrative, the interviewees being the “authentic homosexuals”, either they do not engage into proper relationships<sup>1166</sup> or if they do, they are not doing it only for sex, but because it “is the person” that attracts them, or because it is “a mental thing, not only a physical one”. Moreover, they usually referred to the life with their prison partner by stressing the importance of maintaining and respecting other inmates’ privacy.

In other words, there seem to be a characterisation of sexuality as an element that contributes to connecting people and orienting them towards each other that is somehow diminishing if it not accompanied by love, or by a long-term project of family, or if it is manifested too overtly. The combination of societal assumptions rooted in participants’ belief, emphasised by the prohibitionist policies of prison, highlights this conflict between “inappropriate sex” and “meaningful relationships.”

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I’ll have a crack on with it, I think it’s something more that you get in the main side, rather than someone who is openly gay.”

<sup>1162</sup> Interview with Andrea, prisoner at ITA-5 (28 August 2018): “in my opinion, they like sex and therefore they miss it and they automatically start looking for it here” (*secondo me perché gli piace il sesso e quindi gli manca il sesso e automaticamente lo vanno a cercare qua*); Interview with Cynthia, prisoner at UK-2 (27 February 2019): “I find that the women that come in into prison and then suddenly decide that they are lesbian because they are prison, get everybody else hooked.” On the notion of situational homosexuality, see e.g. Hensley, n.198.

<sup>1163</sup> Interview with Drew, prisoner at UK-2 (27 February 2019): “they experiment to find out if they are [lesbian] or not, but I’d say the biggest majority is comfort, because they are lonely.” Interview with Vera, prisoner at UK-2 (27 February 2019): “a lot of people in here tend to, they never had a relationship with other women and then when they are in here, they want that comfort.”

<sup>1164</sup> Interview with Cynthia, prisoner at UK-2 (27 February 2019). Andrea at ITA-5 said something similar: “[women who have sex in prison, but would not identify as lesbian outside] they are not really lesbian” (*[le donne che fanno sesso in carcere, ma non si dichiarano lesbiche fuori], non sono vere lesbiche*).

<sup>1165</sup> Interview with Gloria, prisoner at ITA-5 (28 August 2018) (*A me me da fastidio la gente che entra in carcere e c’ha il marito fuori con i regazzini ed entra qua capito, che sta con le ragazze*).

<sup>1166</sup> Interview with Alessia, prisoner at ITA-5 (28 August 2018): “I do not believe that here in prison it is love. Only a few couples who started their relationship here in prison went out and became a family” (*E qui in carcere non credo sia amore. Anche le coppie che nascono qui in carcere, sono state poche le coppie che sono uscite dal carcere e hanno avuto una famiglia*).

This probably links with another categorisation introduced several times by the interviewees, i.e. the denigrating representation of prison “faggots”. Sara explained they annoyed her because “they cry and chat worse than women do” and called them by using feminine pronouns. “They are shameless” according to Roman, and they “go looking for heterosexual men”. They are generally considered as playing a passive role sexually: by implication, heterosexual men and “true homosexuals” play an active role. It is noteworthy that these individuals are associated with female traits, thus automatically attached to a certain role during sexual activity that is meant to reflect their weaker position of power in a conflation of sex, gender identity and sexual orientation. To confirm such essentialist processes, they are sometimes described as if they were transgender subjects: “they have this ambition, they feel like a woman and they almost want to have a transition that is why they look for the heterosexual man.”<sup>1167</sup>

The gender binary scheme can manifest in specific ways for transgender women hosted in male prisons. Particularly, Teresa pointed out that men are attracted by transgender women inside prison as a surrogate for cisgender women they cannot have access to:

*“I think that a transsexual woman in prison substitutes a [cisgender] woman for [male] prisoners. I see it as something fake, because outside a heterosexual man would pay attention to a woman, not to a trans person, except in exceptional cases, therefore I see it as a fall-back.”*<sup>1168</sup>

A terminology reiterating essentialist tropes within the LGBTQ prison minority deserves attention. It was used more by Italian male prisoners rather than English ones. Although any sexual-related activities were narrowed down by English homosexual male participants as phenomena happening in the main wings and not in the VPU, it could be argued that the more limited legal protections offered to LGBTQ people in Italy, and the lesser degree of acceptance of gender diversity and sexualities in Italian society,<sup>1169</sup> are mirrored by the more diffused stereotypical labelling among prisoners.

At ITA-5, these binary normative assumptions manifested in a different way. A group of inmates, including some of my participants, used to dress performing masculine tropes (very short hair, razored on the side, long t-shirts, a baseball hat and baggy jeans). They captured the attention of other female prisoners, who saw them as more masculine presences in the penal estate. The similarity of their outfit was curious, as well as the

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<sup>1167</sup> Interview with Roman, prisoner at ITA-4 (22 August 2018): “[Faggots] experience the ambition to say ‘I feel like a woman, I’m more than gay, I almost would like to transition [and I look for heterosexual men]’” (*Vivono quest’ambizione [le checche], per dire, io mi sento donna, sono più del gay, vorrei quasi avere una transizione [e vado alla ricerca dell’eterosessuale]*). There is a conflation between sex, sexual orientation and gender identity at play here: see Valdes, n.32.

<sup>1168</sup> Interview with Teresa, prisoner at ITA-3 (7 August 2018) (*una transessuale in carcere sostituisce una donna per i detenuti. La vedo una cosa finta perché fuori un uomo eterosessuale darebbe attenzione ad una donna, non ad una trans, a meno che non sia proprio un caso eccezionale, quindi lo vedo un po’ un ripiego*).

<sup>1169</sup> As a member of the EU, Italy complied with EU law by introducing legislation protecting individuals from discrimination on grounds of sexual orientation, though only confined to the work environment. Legislative decree 216 enacting in the Italian legal system the EU Council Directive 2000/78/EC (Official Gazette n. 187, 13 August 2003). In 2016, Italy passed a law recognising the right for same-sex couples to enter a civil union, an institution that formalised their relationship, but marriage remains a strictly heterosexual institution, and same-sex couples cannot adopt children. Law 20 May 2016, n. 76 (Official Gazette 22 May 2016, n.118) (Cirinnà law).

division of roles that would automatically take place, almost mimicking a more classic heterosexual paradigm, with the masculine woman playing the part of the man in the relationship.

Ultimately, these differentiations, besides being favoured by the specificity of organisational power dynamics of the prison environment do not necessarily reflect the plurality of experiences that the interviewees themselves have lived in prison. For example, Fiona was in a relationship with Andrea, but she identified as heterosexual before being sentenced to prison. She had a husband and children outside. Thus, she represented the perfect example of “curious straight” who would have engaged in same-sex relationships only for sex. Contrariwise, she maintained a sentimental relationship with Andrea. She used to have other partners before him, yet always describing these bonds as more than just sexual encounters. She indeed explored this new dimension of her sexuality and identity for the first time in prison.

Similar stereotypes are fuelled by strict definitions of sexual orientations and gender identities, archetypical notions of the masculine and the feminine based on gendered assumptions. Nonetheless, also loneliness, mental health issues and sexual frustrations lead LGBTQ prisoners, particularly if segregated, to censor behaviours that can place them on the radar of prison staff for disciplinary sanctions, or that represent overt expressions of sexualities and identities that cannot find place in the surveillance-based carceral state.

Ultimately, it all seems to connect with the lack of recognition of a right to sexuality as a core component of the principle of human dignity, whose consequences are well exemplified in both jurisdictions by the debate on the lack of conjugal visitation programmes in prison.

#### 6.5.9 Contacts with the outside: a delicate balance between security and the right to privacy

The same contrast between guaranteeing security and maintaining relationships with loved ones that characterises the debate around conjugal visits is replicated with similar arguments in relation to social visits, with the difference that the legislator and the judiciary addressed this issue more in-depth. International standards clearly support the right of prisoners to receive visits or have contacts with their families, partners and friends,<sup>1170</sup> while national jurisdictions seem to have fewer concerns in regulating contacts that do not have a sexual connotation. This does not mean that prison policies on social visits do not present problematic aspects, as emerged also in the participants’ accounts.

In England, social visits are regulated by the 1999 Prison Rules and a number of Prison Service Instructions:<sup>1171</sup>

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<sup>1170</sup> The Mandela Rules provide that prisoners should be allowed to communicate with family and friends regularly, not only via correspondence, but also electronically when available, and by receiving visits: SMR, Rule 58. The EPR state that prison authorities should guarantee that prisoners can maintain and develop family relationships in as normal a manner as possible, and enjoy and frequent visits as possible: EPR, Rule 24. The European Court of Human Rights has presented a trend towards strengthening forms of communication among prisoners, were they correspondence or other forms of communication. Van Zyl Smit and Snacken, n.158, at 227, 235-236.

<sup>1171</sup> HM Prison and Probation Service, PSI 15/2011, Management and Security of Visits, 1 April 2011; HM Prison and Probation Service, PSI 16/2011, Providing Visits and Services to Visitors, 31 January 2019.

*Special attention shall be paid to the maintenance of such relationships between a prisoner and his family as are desirable in the best interests of both.*

*A prisoner shall be encouraged and assisted to establish and maintain such relations with persons and agencies outside prison as may, in the opinion of the governor, best promote the interests of his family and his own social rehabilitation (R. 4(1) (2)).*<sup>1172</sup>

Social visits should be maintained in compliance with Art. 8 ECHR. A recently adopted Policy calls the prison management to cooperate with families and prisoners to ensure that social visits are conducted effectively, further providing for the establishment of an Assisted Prison Visit Scheme that can help selected family and significant others to gain assistance to enjoy visitation programmes.<sup>1173</sup>

This programme is included in the Incentives and Earned Privileges Scheme (IEP) that offers prisoners extra visitation time in case of good behaviour upon the Governor's decision.<sup>1174</sup>

The IEP system must take into account equality considerations, including on grounds of sexual orientation and gender identity (PSI 30/2013). In September 2018, a new consultation was launched with Prison Governors concerning a new IEP policy.<sup>1175</sup> The consultation aim is to “empower governors to design their own programme of incentives tailored to the specific challenges in their prison.” If inmates behave well and participate in education and employment activities, they receive privileges, such as more time in the gym or additional visits.

Although giving more flexibility to Governors, including the possibility to extend the number of hours a prisoner can spend outside their cell, some aspects of this proposal are problematic. First, not all prisons are equipped with adequate services and rehabilitation programmes, thus making it harder for inmates inhabiting these estates to obtain the incentives.

Secondly, the logics of linking essential life moments for prisoners' health and rehabilitation, such as receiving visits and doing physical activity, with a reward scheme, goes against fundamental human rights. Visits should be ensured at the maximum extent wherever possible, particularly as international sources have repeatedly affirmed that contacts are considered essential to counterbalance the “potentially damaging effects of

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<sup>1172</sup> The Ministry of Justice Resettlement Survey 2998 reported that offenders who receive family visits whilst in custody are 39% less likely to reoffend. See PSI 16/2011, n.1173, par. 1.2. PSI 16/2011 was recently amended in light of the Strengthening Prisoners Family Ties Policy issued by the Ministry of Justice and the HMPPS in January 2019. The Policy also cites data supporting the argument that maintaining family ties or seeing children contribute to prevent prisoners' reoffending. See MoJ, HMPPS, ‘Strengthening Prisoners Family Ties Policy Framework’, 31 January 2019, at [[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/775554/strengthening-prisoners-family-ties-policy-framework.pdf?\\_ga=2.51675296.806360014.1566824037-1668255436.1563198435](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/775554/strengthening-prisoners-family-ties-policy-framework.pdf?_ga=2.51675296.806360014.1566824037-1668255436.1563198435)], accessed 2 March 2020, p. 4.

<sup>1173</sup> Strengthening Prisoners Family Ties Policy Framework, *ibid*, par. 4.11.

<sup>1174</sup> HM Prison and Probation Service, PSI 11/2011, Incentives and Earned Privileges, 23 January 2019. Rule 8 and 35 Prison Rules.

<sup>1175</sup> Ministry of Justice, ‘New incentives framework to help prisoners turn their lives around’, 3 September 2018, at [<https://www.gov.uk/government/news/new-incentives-framework-to-help-prisoners-turn-their-lives-around>], accessed 19 September 2018.

imprisonment”.<sup>1176</sup> Furthermore, it may be that episodes of violence and other forms of bad behaviour can be dictated by a sense of frustration and isolation that will be exacerbated by a limitation of visits.<sup>1177</sup>

As observed in previous sections, LGBTQ prisoners are often the target of higher surveillance for fear that they engage in sexual activity, while prison staff may reprimand inmates even for acts like hugging or kissing. The dynamics created by segregating LGBTQ inmates favour cases qualified as “bad behaviour”, thus risking limiting visitation time.

The Italian legal system also internalised the human rights principle of maintaining family ties as part of the rehabilitation process.<sup>1178</sup> Accordingly, the *Corte di Cassazione* specified that this essential component finds its most important realisation in social visits.<sup>1179</sup> The judges also stipulated that orders affecting social visits in a way that can worsen punishment have an impact on subjective rights and can consequently become the object of a claim before the *Corte di Cassazione*.<sup>1180</sup>

This interpretation is different to the English one, reiterating the importance of visitation programmes and attaching management decisions to a form of judicial control.

The frequency of visits is an important factor to make prison life more tolerable. Although the majority of participants stressed the significance of visits for this purpose, they also reflected on the delicate line between the positive effects of seeing a beloved person, and the destabilising effects these meetings can provoke: “Visits are useful to me, perhaps the meeting with my daughters is the one I wait most during the whole week, but when you go back to your floor, you are not okay” confessed Flavia. Teresa had a complex relationship with her parents: “It is bad when you see your family sometimes because you miss them and you may have watery eyes, you touch upon poignant topics, that is why sometimes I would rather not see them and receive their

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<sup>1176</sup> Council of Europe, Committee of Ministers, Recommendation Rec 2003(23) of the Committee of Ministers to member states on the management by prison administrations of life sentence and other long-term prisoners, 9 October 2003, par. 22-23.

<sup>1177</sup> For instance, Andrea said to me: “My ex-girlfriend still comes visiting me. We have remained on good terms. They [my family] also come visit me. Visits from outside are good for a prisoner. They turn your brain off from prison. They are good” (*La mia ex compagna viene ancora a farmi i colloqui. Siamo rimasti in buoni rapporti. Loro [i miei familiari] vengono a trovarmi. E fanno bene le visite da fuori, per un carcerato. Ti distacca un attimino il cervello dal carcere. Fanno bene*). Simon talks of his friend’s visit by saying: “it is a moral support for the both of us. At the moment, that’s the only visit I do get”.

<sup>1178</sup> Italian Law on Prison, n.394, Art. 15 and 28: “Family, in its larger meaning, that can be linked with the sphere of affection of the convicted person [...] constitutes a reliable reference point for the legal system to which special care must be devoted” (*Nella sua dimensione più ampia riconducibile alla sfera affettiva del detenuto [...] la famiglia costituisce per l’ordinamento un sicuro punto di riferimento al quale dedicare particolare cura*). See also Carlotta Bargiacchi, ‘Esecuzione della pena e relazioni familiari. Aspetti giuridici e sociologici,’ (2002), ADIR, at [<http://www.adir.unifi.it/rivista/2002/bargiacchi/index.htm>]. The introduction of civil unions for same-sex couples in Italy extends to registered same-sex couples visitation rights when one of the partners is a prisoner. Cirinnà law, n.1171, Art. 1, par. 38.

<sup>1179</sup> Corte di Cassazione, Penal Section I, sent. 18 December 2014 (hearing 30 June 2014), n. 52544. On the relevance of maintaining family ties in prison, see also Corte di Cassazione, Penal United Sections, sent. 6754/2003.

<sup>1180</sup> Corte di Cassazione, Penal Section I, sent. 20 December 2011 (hearing 29 November 2011) n. 47326 and sent. 8 July 2011, (hearing 4 May 2011) n. 26326.



economic help, so I would not ruin my day.”<sup>1181</sup>

This narrative illustrates why visits should not be treated as a privilege that you can withdraw according to discretionary assessment of behavioural standards, as they can unveil a number of emotional experiences that require particular care of prisoners’ psychological health in the visit aftermath, even more so when an inmate has children.<sup>1182</sup>

In England, the 2019 *Strengthening Prisoners’ Family Ties* recommended Governors and staff to invite prisoners to receive visits. It also proposed to put in place support services for prisoners who do not receive any visits, for instance by involving the *Samaritans* association. This is particularly relevant for LGBTQ prisoners, who are often at odds with their families or have been marginalised by their relatives. The impossibility of getting family support is one serious cause for transgender people to start committing crimes as they lack financial resources and consequently enter the CJS.<sup>1183</sup>

#### 6.5.9.a Who can qualify as visitor?

The ECtHR has progressively extended the notion of family for the purpose of prison visitation rights.<sup>1184</sup> Both English and Italian institutions followed this trend domestically.

In England, Prison Rules and PSIs refer to family, children and significant others when it comes to define which individuals are entitled to visit prisoners. Same-sex couples are admitted to visit their partners in prison, at some conditions: spouses are admitted to visit, as well as civil partners, and fiancés or fiancées “provided that the Governor is satisfied that a bona fide engagement to marry exist.”<sup>1185</sup> People who have “clearly demonstrated the intention to register a civil partnership but have not yet done so may also be included within

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<sup>1181</sup> Interview with Teresa, prisoner at ITA-3 (7 August 2018) (*È brutto quando si vede la famiglia perché comunque ti manca e magari vedi gli occhi lucidi, si affrontano discorsi che comunque toccano, ecco perché a volte preferirei non vederla e avere solo l’aiuto economico di modo che non mi rovino la giornata. Altre volte magari hai i tuoi problemi e la famiglia te li aumenta perché ti vede così*).

<sup>1182</sup> PSI 15/2011, n.1173, par. 3.31. Codd and Scott, n.237.

<sup>1183</sup> Poole and others, n.270. Kimberley told me that she did not have contacts with her family as it would be painful for her to the point of harming herself: “No, no contact whatsoever because it was, it was like if I had contact with my family I self-harm and everything and I won’t have a contact with them without self-harming. And it’s like I’m happy but then when I am with them I am like miserable and self-harming.”

<sup>1184</sup> The Court has tended through the years to extend the notion of family to the fiancée of an unmarried prisoner, and sometimes to friends. Ultimately, “detainees should be allowed to meet not only their relatives but also other persons wishing to visit them”. See *Ostrovar v Moldova* (ECHR 2005/14), 13 September 2005; In *Ciorap v Moldova*, the Court affirmed “it is an essential part of both private life and the rehabilitation of prisoners that their contact with the outside world be maintained as far as practicable, in order to facilitate their reintegration in society on release, and this is effected, for example, by providing visiting facilities for the prisoners’ friends and by allowing correspondence with them and others”. *Ciorap v. Moldova*, application no. 12066/02 (ECtHR, 19 June 2007).

<sup>1185</sup> HM Prison and Probation Service, PSI 14/2016, Marriage or civil partnership registration of prisoners, 14 October 2016, par. 5.14. PSI 14/2016 regulates the marriage or civil partnership registration of prisoners. The Instruction refers to the Marriage Act 1983 affirming that both parties to the marriage must “notify the Superintendent Registrar in person of their intention to marry”. It prescribes the application of the Asylum and Immigration Act 2004 in case either party is subject to immigration control.

this definition of close relative for the purposes of social visits.”<sup>1186</sup> Regarding *de facto* partners, they include “a person – whether of the same or different sex – with whom the prisoner was living as a couple in an established relationship immediately prior to imprisonment.”<sup>1187</sup>

The provision seems to include partners who did not officialise their relationship via marriage or civil partnership, although it is not clear what an “established relationship” entails. The case law examined before seems to imply at least some form of long-standing cohabitation arrangement. However, the stability of the relationship does not appear to be required for a fiancé until the engagement is proved, or for a couple who intends to formalise their civil partnership.

Marriage, with its symbolic meaning, appears to be particularly favoured in these circumstances, even when the interested persons are only engaged, as Governors can decide discretionally if they believe their intent is based on good faith; in contrast, proving the intention to enter a civil partnership seems to require a higher evidentiary threshold, with a “clear demonstration” of their intent. It is not specified what this entails, although one can assume that the notice of proposed civil partnership and declaration according to the standard procedure as regulated by the Civil Partnership Act 2004 should satisfy the prison instruction criteria.<sup>1188</sup> The Act also provides for a specific procedure to give notice of the intention to conclude a civil partnership when two people wish to register as civil partners of each other at the place where one of them is detained.<sup>1189</sup>

Even in the context of social visits, State power gives prominence to the marital bond, where the intent to marry requires a lower evidentiary threshold than civil partnership or cohabitation.<sup>1190</sup>

In Italy, the notion of family is often recalled in the regulation of social visits. Bargiacchi highlights that family has been interpreted in the context of Italian prison law as an instrument to enhance the convicted person’s rehabilitation, rather than promoting it as a constitutional institution as such.<sup>1191</sup>

Art. 18 of Prison law on social visits includes close relatives and other persons among people who are admitted to visit a prisoner or correspond with them, while particular significance is attributed to visits with family members.<sup>1192</sup> The Implementing Regulation equalises closed relatives and cohabitees,<sup>1193</sup> while prison orders specify that the Prison Service should apply these provisions with the widest possible discretion to continue

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<sup>1186</sup> Id.

<sup>1187</sup> Ibid. The Assisted Prison Visits Scheme is available for family, close relatives, partners and sole visitors. Besides the inmate’s husband, wife or civil partner, the Scheme also applies to partners who were living as a couple before the prisoner went into prison: see Assisted Prison Visits Scheme – Visitor Guide July 2017, at [[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/627024/APVU-guidance-for-visitors-GOVUK.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/627024/APVU-guidance-for-visitors-GOVUK.pdf)], accessed 2 March 2020, p. 2.

<sup>1188</sup> See Civil Partnership Act 2004, S. 8.

<sup>1189</sup> , S. 19.

<sup>1190</sup> It must be noticed however that PSI 14/2016 prescribes for couples who wish to marry when either party is in prison, to give their notice of their intention to marry. After notice is given, both parties need to indicate where they want the marriage to take place. Although not specified, it could be argued that the Governor would check these requirements are met to allow a fiancé or fiancée to visit a prisoner. See PSI 14/2016, n.1187, par. 7.4 and 7.6.

<sup>1191</sup> Bargiacchi, n.1180.

<sup>1192</sup> Italian Law on Prison, n.394, Art. 18 (*i detenuti sono ammessi ad avere colloqui e corrispondenza con i congiunti e con altre persone*”; “*particolare favore viene accordato ai colloqui con i familiari*).

<sup>1193</sup> D.P.R. 230/2000, n.726, Art. 37.

maintaining family ties.<sup>1194</sup> Significantly, the Order highlights that the Prison Service should focus on the sociological development of the notion of family, which can be defined as a social group and a fundamental unit of social organisation, qualified by common residence, economic cooperation and reproduction.<sup>1195</sup>

Interestingly, Italian law opened up to the recognition of same-sex prison partners years before the Italian Parliament legally acknowledged civil unions between persons of the same sex, favouring the application of the rehabilitation principle over the constitutional interpretation of family. Indeed, cohabitants were defined as “the persons who share a same living space, without attaching any relevance to the sexual identity and the actual type of relationship existing with the prisoner, were they *more uxorio* [as husband and wife], of friendship, of domestic partnership, of equal division of labour, or other.”<sup>1196</sup>

“Valid” intimate relationships, yet not “legally relevant,” could be included in the category “other” as provided by Art. 18 of Prison law, although it is upon prison Governors to assess whether the criteria for admitting an individual to visit a prisoner are met.<sup>1197</sup>

Although promising in its effects, from a philosophical point of view the law and instructions put same-sex couples on the same level as friends or people living together for various reasons, without fully recognising the special bond of affection qualifying the relationship.

At present, the act introducing civil unions for same-sex couples explicitly extends the application of all provisions referring to spouses also to cohabitants within prison laws and regulations. In all cases where a provision presents the word “spouse” or similar terms, these norms shall be applied also to each party to the civil union among persons of the same sex.<sup>1198</sup>

In practice, participants described a slightly different scenario, stressing their struggles to get permission to receive visits from friends or non-cohabiting partners. Elena underlined how it was difficult to have a partner visiting her unless they had “a stable relationship on paper, that is if you are not married, living together or stuff like that. I am not sure if they would give the authorisation to non-cohabiting partner to come visiting

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<sup>1194</sup> Order of National Prison Service (*Circolare D.A.P.*) n. 3478/5928, 8 July 1998.

<sup>1195</sup> *Ibid*, at 3-4 (*un gruppo sociale o un'unità fondamentale dell'organizzazione sociale, caratterizzato dalla residenza comune, dalla cooperazione economica e dalla riproduzione*). However, by considering close relatives and family on the same ground, the Prison Service narrows them down to spouses and relatives (by blood or others) within the fourth rank. Relatives within the fifth or sixth rank are considered as external to the family.

<sup>1196</sup> *Ibid*, at 5.

<sup>1197</sup> *Ibid*, at 10-11. Italian Law on Prison, n.394, Art. 18. The extensive interpretation of the persons who are admitted to social visits aligned with the progressive interpretation of the case law of the ECtHR, which already extended the notion of family members to include also the fiancée of a prisoner of single status (*Wakefield v UK*, Application No. 15817/89, (ECtHR, 1 October 1990) and to the cohabitant who used to be in a relationship with the prisoner for years (*Petrov v Bulgaria*, Application no. 15197/02 (ECtHR, 22 May 2008).

<sup>1198</sup> Cirinnà law, n.1171, Art. 1 par. 38 and par. 20. For an analysis on the consequences of Cirinnà law on criminal law, see e.g. Gian Luigi Gatta, ‘Unioni Civili Tra Persone dello Stesso Sesso: Profili Penalistici’ (2017), at [[https://www.penalecontemporaneo.it/upload/GATTA\\_2017a.pdf](https://www.penalecontemporaneo.it/upload/GATTA_2017a.pdf)], accessed 26 August 2019; Marina Nenna, ‘Riforma delle Unioni Civili: Le Questioni di Natura Penale’ (2016), 9 *Rivista Penale*, 735-739. Gatta observed that the equivalence between cohabitant and spouse within prison law had already been introduced by the legal and regulatory norms on prison, whereas the Cirinnà law’s only innovation consists of extending the admissibility of requesting certain alternative measures to imprisonment also upon the cohabitee. See Gatta, at 5.

me.”<sup>1199</sup> Andrea, who spent their sentence in a female prison, observed that an ex-girlfriend could see her as they were living together. “If we were not cohabiting, she could not come in.”<sup>1200</sup> Gloria filed a request to add a third visitor to her personal list, but her application was rejected by the judge for a procedural error.<sup>1201</sup>

Indeed, the Italian Implementing Regulation on Prison affirms that people who do not qualify as spouses of cohabitantes can visit prisoners, but only if they are authorised by the Prison Governor on “reasonable grounds.”<sup>1202</sup> Therefore, there is a margin of appreciation that the prison management can exercise which seems to create a differential treatment penalising those relationships which are not considered sufficiently stable. Criteria to assess stability appear however to be modelled on a traditional family model that does not necessarily reflect current relational arrangements in society.

The regulatory framework thus presents many possible complications for inmates who want to see their loved ones. In particular, the necessity for partners to live together to qualify as a couple in the eye of the law does not reflect how relationships develop nowadays, where two persons can be committed or “officially” in a relationship for a long time without cohabiting.

In Italy, the lack of a comprehensive Equality Act complicates the possibility of prisoners obtaining protection against unfair practices.

#### 6.5.9.b *The visit experience: a constructed relational framework based on surveillance*

The number of visits prisoners can receive are limited on a monthly basis. In England, prisoners have the opportunity to receive “at least two, one-hour social visits every four week period.”<sup>1203</sup> A visit after the initial reception must be included, and at least one every two weeks thereafter, including at least one weekend visit every four weeks.<sup>1204</sup> Up to three adults, together with accompanying children “should be normally allowed at each visit”.

Italian prisoners have more opportunities for visits on average, as the law provides for six one-hour visits per month, although in exceptional circumstances it is possible to extend the duration of the visit with a spouse or

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<sup>1199</sup> Interview with Elena, prisoner at ITA-3 (7 August 2018) (*difficile che mi venga a trovare una persona con cui magari non ho una relazione stabile sulla carta, cioè non siamo sposati, conviventi o balle varie. Non so se darebbero il permesso [ad un compagno non convivente di venirmi a trovare]*).

<sup>1200</sup> Interview with Andrea, prisoner at ITA-5 (28 August 2018) (*Non ho avuto difficoltà ad avere il permesso di ricevere visite dalla mia ex compagna perché facevamo la convivenza insieme. Se non siamo conviventi non può entrare*).

<sup>1201</sup> Interview with Gloria, prisoner at ITA-5 (28 August 2018) (*io ho fatto pure la richiesta della terza persona per visite, amici, e il magistrato non me l'ha accettata, perché quella deve arrivare tipo da un'altra persona e non so chi si è e vedere se te l'accetta*).

<sup>1202</sup> D.P.R. 230/2000, n.726, Art. 37 (1).

<sup>1203</sup> PSI 16/2011, n.1173, at 7.

<sup>1204</sup> Ibid. The Instruction also stipulates that “convicted prisoners must also be informed that they can accumulate up to 26 statutory visits during any twelve-month period. These may be taken at their current establishment or they may apply to be temporarily transferred to take them at another prison suitable for their age, security classification and gender.” Un-convicted prisoners have the right to receive at least three, one-hour social visits each week, one of which may be in a weekend.

partner.<sup>1205</sup> It is however extended to two hours when close relatives or cohabitees come from a different municipality than the one where the penal institution is located, if in the previous week the prisoner did not receive any visits. Even the Italian regulations state that no more than three persons can attend the visits, but it foresees the opportunity to derogate from the rule when one of the visitor is a spouse or a cohabitee.<sup>1206</sup>

Participants confirmed that they benefit from the number of visits represented in prison policies, further specifying some exceptions. In Italy, persons who committed crimes that the CJS considers particularly heinous (e.g. sex offences, certain types of thefts, drug-related crimes)<sup>1207</sup> are granted a more limited number of visits: “It depends on what crime you committed. If you have committed a certain type of crime you do four visits per week, otherwise you have six visits per week” Alessia explained.<sup>1208</sup>

In England, the IEP scheme may cause an increase or decrease in the number of visits. As William put it: “if you play by the rules, you can apply for a different status. You get prisoners on a basic standard and enhanced levels. So most prisoners are standard, but if you behave yourself, you can apply for enhanced level [and have more visits].”<sup>1209</sup>

The majority of participants wished to have more occasions to see their families and loved ones. They also observed that one hour is barely sufficient to scratch the surface of what is going on in each other’s lives,<sup>1210</sup> even if participants with children or whose visitors come from distant places can spend more time at each visit.<sup>1211</sup>

During the visits, which usually take place in large halls with several tables, inmates are subject to various forms of surveillance. The lack of privacy is the most prominent aspect of the visitation experience emerging from participants’ accounts.<sup>1212</sup> On one side, visits take place in common areas, thus surrounded by other inmates, even if in small prisons it is possible that there is no other inmate present when the visit takes place.<sup>1213</sup>

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<sup>1205</sup> D.P.R. 230/2000, n.726, Art. 37 (8) (10).

<sup>1206</sup> Ibid, Art. 37 (10).

<sup>1207</sup> See Italian Law on Prison, Art. 4 bis.

<sup>1208</sup> Interview with Alessia, prisoner at ITA-5 (28 August 2018) (*Allora, poi dipende che reato hai: se hai l’ostativo fai 4 colloqui al mese, se non hai reati ostativi ne hai 6, 6 colloqui al mese. Due a settimana, perché poi ci stanno i mesi da tre settimane*). This was confirmed also by Teresa, Andrea and Gloria.

<sup>1209</sup> Interview with William, prisoner at UK-1 (28 November 2018).

<sup>1210</sup> Interview with Roman, prisoner at ITA-4 (22 August 2018): “Unfortunately the communication with family is really not much, six hours a month. Either you talk with your mum, with your aunt, with a friend, they must all have no priors” (*Purtroppo la comunicazione con la famiglia qua è veramente poca, sei ore al mese. Sei ore al mese, o parli con la mamma, con la zia, con l’amica, tutti incensurati devono essere*).

<sup>1211</sup> Interview with Cynthia, prisoner at UK-2 (27 February 2019): “My parents come twice a year: my birthday and Christmas. Usually, it’s just a blanket two hours, it doesn’t matter if someday they live around the corner, and then parents came, they get two hours”. Interview with Fiona, prisoner at ITA-5 (27 August 2018): “with minors, I do my four hour meeting with my children alone, so that in those four hours my mum has a moment to catch her breath” (*Con i minori mi faccio 4 ore da sola con le mie figlie, e mia madre in quelle 4 ore respira un attimino*).

<sup>1212</sup> Interview with Craig, prisoner at UK-1 (28 November 2018): “No, there is no privacy at all, and we are actually with the mains during social visits.”

<sup>1213</sup> For instance, Riccardo said that “you are in a hall, sometimes you have privacy when you arrive because there are not any other visits, or if I am not allocated in the hours where it is more crowded” (*siamo in una sala, sai la privacy a volte c’è quando arrivi da solo perché non ci sono più altri colloqui, o per vari motivi non sono nelle ore in cui ci sono tante persone*).

Although some, like Vera or Teresa, underlined that since the noise is so loud and everyone is focused on their visitors, prisoners are not interested in overhearing other people's conversations, prison staff exercise visual control during the whole visit.<sup>1214</sup> Video-surveillance is generally present.<sup>1215</sup>

The strict limitations on contacts, justified on the basis of security reasons, for instance to prevent drug smuggling, represented the most problematic aspects for my participants, particularly if they were visited by their partners. Some, such as Riccardo, were conscious of the presence of children, and they felt these can be somehow disturbed by the view of two men kissing each other,<sup>1216</sup> but interviewees rarely brought it as a legitimate justification to the general policy. More often, participants qualified these restrictions as painful.

Policies in England clarify that "reasonable physical contact should be permitted", but only at the beginning and end of visits.<sup>1217</sup> In addition, the prisoner can stand up only in these moments, while they must stay seated for the rest of the visit.

In Italy, the Implementing Regulation includes a broad provision stating that appropriate behaviour must be held during the visit, while prison staff in charge of surveillance can suspend the visit of people who entertain inappropriate or disturbing behaviour, yet the ultimate decision relies upon the Governor.<sup>1218</sup>

Participants of both jurisdictions gave similar accounts of how they could kiss their visitor, or hug them, at the beginning or at the end of the visit, but during the meeting they could not touch each other.

Although these limitations to physical contacts may be justified for security reasons, they make it very hard for prisoners to bear the sufferings and sexual frustrations of imprisonment, especially considering the ban on conjugal visits.

The visitation experience can raise serious security concerns for prisoners hosted in a VPU. Participants at UK-1 denounced the fact that the general prison population considers all inmates in the VPU sex offenders, consequently becoming the object of offensive speech and potential harassment. Since VPU prisoners are

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<sup>1214</sup> Interview with Vera, prisoner at UK-2 (27 February 2019): "It sounds really mad, but even though it's such an open room, and a big room, you do have privacy, because the noise level is that high you can't really hear what anybody else is talking about". Interview with Teresa, prisoner at ITA-3 (7 August 2018): "It can happen that there are more visits together in the same place, but each one takes a corner and you can talk privately" (*può essere che ci siano più colloqui insieme nello stesso posto, però ognuno si prende un angolino e si parla privatamente*). See also PSI 15/2011, n.1173: "Social visits take place in full view of staff. The designated Visits Manager's workstation must be on a raised platform so they can easily oversee the whole visits room at all times when seated."

<sup>1215</sup> Interview with Gloria, prisoner at ITA-5 (28 August 2018): "No, there is no privacy, cameras are always present" (*No, non hai privacy, sempre con le telecamere, magari*). In England and Wales, PSI 15/2011 (n.1173) regulates: "In the case of high and exceptional risk prisoners, the visits room must be equipped with CCTV, recording either full time or multiplex."

<sup>1216</sup> Interview with Riccardo, prisoner at ITA-4 (22 August 2018) (*non va bene che due uomini si diano un bacio si diano la mano, se fossero uomini adulti si dà ragione. Se ci sono dei bambini...*)

<sup>1217</sup> PSI 15/2011, n.1173, par. 2.12; PSI 16/2011, n.1173, at 7. Rule 51 of the Prison Rules considers it an offence to receive an article or controlled drugs during a visit. This policy is formally in line with the case law of the ECtHR, which has stated that that restrictions on contact during visitation programmes may be legitimate, but cannot reach the point of avoiding any physical contacts. See *Ciorap v Moldova*, n.1186.

<sup>1218</sup> DPR 230/2000, n.726, Art. 37(4).

always placed all together in the same area of the visitation room, insults against them from other prisoners become the norm:

*“When we go on visits from this wing and we walk around through the general population they get name shouted through the windows anyway, without having another reason for people to shout at you. So only the fact that you are on this wing, you are already stigmatised because you are on this wing, you are seen as a sort of rapist, or a paedophile, or similar like that. You may not be, no one has got any idea why you are on the wing, but anybody is stigmatised with the same thing.”<sup>1219</sup>*

Simon added to this account:

*“it has nothing to do with sexuality. When you go on visits...people on this wing go to visits, imagine it is a long visits hall, with – I don’t know – 50 tables, 50 sets of tables and chairs, so you’ll have the prisoners on one side, and the visitors on the other side of the table. And it’s 50 of those, and the people of the VP wing, they are all sitting in one corner, and then obviously the rest of the prison know your face. I was sat there with what was my boyfriend, and nobody said anything about that, but obviously there was name-calling, referring to the wing in general.”<sup>1220</sup>*

This seems to represent a resounding security problem, particularly if compared to the extent of limitations of contacts and surveillance provided for prisoners. It also portrays an environment where tensions among inmates are not really tackled by the carceral state, whose main solution remains to isolate the “undesired,” be they sexual minorities, sex offenders, or any other category who do not conform to the heterosexual male archetype. In so doing, neither the underlying prison culture ever changes nor do prisoners – and their families and loved ones – have their security guaranteed, as this episode demonstrates.

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<sup>1219</sup> Interview with William, prisoner at UK-1 (28 November 2018).

<sup>1220</sup> Interview with Simon, prisoner at UK-1 (28 November 2018).

# Conclusions

This research aimed to analyse how the State power shapes and regulates sexualities and identities in prison. The construction of knowledge offered by interviews with prisoners identifying as LGBTQ shed light on how these minority groups relate with each other, and negotiate their identities and behaviour to survive the carceral state. They let emerge the role played by mechanisms of internalisation of international human rights norms in the perpetuation – and in limited cases – critique of coherent legal sexualities and identities.

I used a qualitative method to sample participants who self-identified as LGBTQ among prisoners located in two penal institutions in England and three establishments in Italy. I undertook a comparative analysis to understand commonalities and dichotomies in the interconnection between essentialist, heteronormative policies and the legal construction of the homosexual and transgender prison subject under the umbrella of the international human rights discourse.

Using queer theory, and its connection with post-modernist feminist streams, I analysed and filled the gaps between the construction of coherent legal sexualities and identities internationally and domestically, and their complex plurality within the prison space. Conducting interviews inside multiple prisons revealed the presence of institutional policies promoting the invisibility of “deviant” subjects through discriminatory and unequal organisational strategies, which are only partially tackled by a human rights discourse which does not fully engage in a critique of the core systemic injustice imbuing the carceral state.

Throughout the thesis, I highlight the need for a process of “queering” of the legal and administrative prison framework. Interviewees proved that manifesting their sexuality and identity represents a daily struggle with very few moments where their instances are recognised, thanks to various mechanisms of resistance that remain however largely ignored by the law.

## 7.1 Main themes and findings: the circle of visibility and invisibility of sexual orientation and gender identity

International standards tend to support a human rights-informed prison system based on the principle of rehabilitation and ensure prisoners’ human dignity. Thus, limitations to deprivation of liberty cannot be absolute and shall be tempered in light of inmates’ fundamental rights. The preminence of this principle has not been automatically transposed in national jurisdictions (particularly in England), due to the struggle to translate it into prison administrative practices, which are less open to human rights compliance.

International bodies have failed to contextualise episodes of violence, isolation and discrimination against sexual minorities and gender non-conforming individuals as systemic problems that amount to inhuman and degrading treatment, or even torture. Together with overcrowding and lack of economic investment in prison



reform, the hypermasculine carceral paradigm fuels queerphobia. The queer analysis conducted in this thesis examined how normalising strategies of human rights law nationally and internationally prevent acknowledgment of LGBTQ identities in the carceral system.

In this context, LGBTQ prisoners live through moments of visibility and invisibility. Their presence as a minority inside penal estates has been slowly acknowledged by national legislators. Thanks to human rights mechanisms, national laws and policies broadly declare that there should be no discrimination based on SOGI. However, the legal framework tends to regulate sexual and gender identities and expressions as an anomaly within the prison complex. It makes them momentarily “visible,” for then bringing them back to invisibility, as exemplified by the separation of LGBTQ inmates from the rest of the population to maintain disciplinary mechanisms of control.

I have analysed institutional strategies to identify people of different sexual orientations and gender identities as they enter prison, and methods used by public authorities to collect data on the LGBTQ prison population. The ways prisoners’ characteristics are identified at admission have a remarkable impact on how data are collected, where prisoners are located, and on their rehabilitation programme.

In England, thanks to the entry into force of the EA 2010, official policies offer the possibility for prisoners to self-declare voluntarily their sexual orientation or gender identity, providing a detailed – even if not exhaustive – range of options among which they can choose. However, the process tends to favour medicalised notions of gender identity overlooking non-binary and transgender people. For instance, even when prisoners’ preferred gender differs from their sex at birth, they can anyway be assigned to the prison aligning with their biological sex. Transgender people need to provide strong medical evidence in the hope of being placed in a penal estate in line with their preferred gender, or where they feel safer.

In Italy, the law recognises and protects LGBTQ people from discrimination in prison only since 2018. There is no official self-identification policy unless inmates individually decide to approach prison staff. Invisibility starts from the very admission stage.

In both countries, making one’s sexuality and gender identity visible is helpful, but it does not guarantee full protection and assistance. Particularly in male prisons, coming out can lead to be located in special wings as a separate group or with other vulnerable categories. Such organisational choice risks promoting marginalisation and invisibility in violation of human rights standards.

Furthermore, State power tends to conflate certain groups, such as bisexual people, with LG prisoners. Inmates who start engaging in same-sex sexual activities after entering prison are often labelled “situational homosexuals” who do this for convenience or comfort, and are treated sceptically by other LGBTQ prisoners.

At ITA-3, the consequences of conflating sex, sexual orientation and gender identity were exemplified by the decision to place transgender women and homosexual men together in one wing. This experiment, which created numerous tensions and led to the separation of the two groups, is a good demonstration of the carceral

state's incapability to question the effects of toxic masculinity. People who do not adhere to the norm are harmed by a system that favours the male heterosexual model.

#### 7.1.1 Protective measures perpetuating invisibility and marginalisation: placement policies for LGBTQ prisoners

The prison system remains entrenched in biological foundations at its very essence, as Prison Rules nationally and internationally continue using a binary language, requiring that female prisoners shall be kept separate from males.

Although national legislation and policies in both countries have addressed – with different levels of regulatory detail – the question of placing people who do not identify with their biological sex, official data show that transgender, non-binary and gender non-conforming prisoners are located for the large part according to their sex at birth.

While the Italian system provides for the establishment of special wings for transgender prisoners which are all placed in male penal estates, except for one case,<sup>1221</sup> in England the HMMPS reviewed the policy on the care and management of transgender offenders to introduce a more social definition of gender identity. However, the process to assess transgender prisoners' requests to be located in line with their preferred gender remains largely based on medical evidence, thus perpetuating a pathologised notion of gender identity that favours transgender people who “fix” their identity through medical procedures. No specific assessment procedure is foreseen by the Italian Prison Service, so it has happened that similar decisions were established in light of a superficial evaluation of inmates' appearances.

The majority of participants hosted at male prisons believed that the hypermasculine prison environment made special sections necessary. Particularly, transgender interviewees manifested a preference for placement in female prisons, where there are fewer risks to be stigmatised and life is more tolerable also for transgender prisoners identifying as males. This does not mean that discrimination and “trans-panic” are not a reality in female prisons, but participants believed it is more manageable.

There was no sympathy for the idea of creating a “special prison” for transgender prisoners, as interviewees interpreted it as a form of stigmatisation and increased marginalisation. These considerations reflect similar conclusions drawn by Ciuffoletti and Dias Vieira in their study on the transgender prison population hosted at Sollicciano prison in Florence. However, I believe that this option should be given more thought. As Elena said in her interview, the success of this model would depend on the structure of this special prison, on the selection and training of staff, and on the willingness to ensure inclusion rather than further marginalisation.

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<sup>1221</sup> The Sollicciano prison in Florence.

Ultimately, data showed that a remarkable problem of policies regarding special wings, particularly the ones dedicated exclusively to transgender or homosexual inmates, relies on ignoring intersectionality in qualifying prisoners only in relation to their gender and sexuality, without taking into account characteristics such as nationality, class, language, religion, age and different cultural traditions, thus “homogenising” the LGBTQ subject.

### 7.1.3 LGBTQ prisoners suffer from precarious health conditions

Health care treatment emerged as a prominent problem from participants’ accounts. LGBTQ interviewees talked about a variety of physical and mental issues affecting their stability, such as distress and increasing frustration leading to violent outbursts, yet access to psychological assistance is limited and affected by delays. Isolation and struggles to access services in light of security concerns contribute to worsen conditions of imprisonment.

LGBTQ inmates, particularly transgender people, are at higher risk of self-harm and suicide, in part due to their difficulty to prove their gender identity, but also for the lack of specialist care for inmates who are transitioning, or wish to transition during imprisonment. In spite of the legal principle of equivalence of care and non-discrimination in ensuring adequate health services, they suffer serious consequences from institutional shortcomings in applying international standards of care.

Being able to obtain a GRC in England or a sentence acknowledging the applicant’s gender identity in Italy has profound implications on the type of protection transgender people can receive inside prison.

Procedures in both countries provide a “real life test” that requires applicants to prove that they live in accordance with their preferred gender, besides compliance with medical requirements.<sup>1222</sup> Transgender inmates do not always have the chance to provide this evidence for lack of access to medical practitioners, including psychologists, that prescribe the necessary hormones, or to undergo surgical treatments. The latter are almost impossible to complete in prison.

Another issue of concern relates to policies on condom distribution and HIV – or other STDs – prevention. Rules prohibiting sex have repercussions on prisoners’ health care, since there is a higher risk that inmates engage in unprotected sex. Balancing the denial of prisoners’ sexuality against protection of health has led to contradictory choices from prison management. Certain penal estates allow the distribution of condoms, thus admitting implicitly that same-sex activity takes place between prisoners. However, courts and public authorities continue to support the legality of policy bans in spite of prisoners’ fears for their well-being.

In sum, systemic issues concerning the prison environment affect the efficiency of health care programmes. The comparison between jurisdictions shows that lack of clear guidelines, such as in the case of the legal

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<sup>1222</sup> Though the English system is less medicalised than the Italian one.

recognition of gender for Italy, or of a coherent framework on sexual health, hinders LGBTQ prisoners' welfare.

#### 7.1.4 Consequences of isolation

The male prisons I visited adopted different strategies to separate LGBTQ prisoners from the rest of the population: in England, they locate homosexual and transgender inmates together with other vulnerable prisoners, such as sex offenders or former members of the police forces; in Italy, special wings host only declared homosexual or transgender people.<sup>1223</sup> National legislation of both countries introduced rules in this sense. The Italian prison law specifically refers to the necessity of protecting people who are targeted, or fear being targeted, because of their sexual orientation or gender identity. Nevertheless, this is not necessarily the same policy adopted in every penal establishment of either jurisdictions, as there is no common guidance on this point.

Participants had different views on the necessity and efficacy of special wings, but they mirrored McNaughton and Webster's finding that placing LGBTQ people in VPU contributes to reinforcing the negative labelling of the general prison population against minority groups who end up being associated with sex offenders. On the other hand, the Italian approach risks breaching LGBTQ prisoners' privacy, particularly whether special wings are explicitly labelled as homosexual or transgender sections in official documents not protected by confidentiality.

Although interviewees overall agreed that they needed special protection in male prisons, they emphasised their lack of contacts, denial of services and health care assistance. This configures a form of direct discrimination and reiterates the negative consequences of a blanket isolation policy that keeps conflating sex and gender.

#### 7.1.5 Diversity and inclusion (or lack thereof) in rehabilitation programmes

The prison organisation is making attempts to introduce roles, programmes or activities directed to LGBTQ inmates. In the English prisons I visited, I found these efforts were integrated more organically in the organisation scheme, whereas in Italy similar initiatives were more sporadic and deeply dependant on individual social workers or members of staff's personal commitment.

This discrepancy between jurisdictions relies mostly on the passing of a comprehensive legal platform against discrimination in the UK, the EA 2010. It introduced negative and positive obligations upon public authorities to respect protected characteristics, including sexual orientation and gender reassignment, and represented a

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<sup>1223</sup> To be precise, certain prisons in Italy continue placing homosexual and transgender people together with vulnerable offenders.

platform to introduce homosexual, lesbian and transgender prisoners' representatives, selected among inmates hosted at the prison to mediate between prisoners, the prison management and staff.

The role was appreciated by participants and helped inmates to diminish the trauma of entering prison during the induction process.

Except for ITA-4, participants reported that the administration organised activities aimed at tackling SOGI-related issues, were they LGBTQ support groups, meetings with criminologists or social workers to discuss specific issues affecting the wing, or workshops on gender identity awareness. At UK-1 and UK-2, they seek to incorporate these activities in the prison organisation, so that repetition and the chance for prisoners to ask questions can contribute to deconstructing homophobic and transphobic bias. Moreover, including LGBTQ people in representational roles may assist "queering" the normative foundations of prison.

Certainly, this process is slow, and LGBTQ-related activities or roles do not engage with cisgender heterosexual prisoners. Although these minorities need their own spaces to share common experiences freely, this strategy risks replicating a mechanism of "othering," since the general prison population and the majority of staff are not challenged in their preconceptions.

On the contrary, when the prison space – usually occupied by cisgender heterosexual inmates – is reclaimed by LGBTQ prisoners, important moments of "queerness" help minorities leave the cone of invisibility to emerge in the spotlight. A noteworthy example of this phenomenon was the organisation of a Pride day inside UK-2, a significant example of cooperation and contact between the prison and the world outside, as families, NGOs and the general public were invited to participate to the event.

In spite of attempts towards inclusivity, it is complicated to deconstruct the prison normative paradigm, which remains largely unquestioned by the human rights paradigm. Interviewees described the activities offered by the prison administration as highly gendered and inconsiderate towards plural identities. Rehabilitation programmes remain based on stereotypical assumptions regarding the type of activities men and women would do. For instance, in women's prisons activities tend to revolve around sewing, cooking, knitting, while men's prisons offer painting or woodwork programmes. Transgender women at ITA-3 said that when they were finally offered an activity to do in isolation from the other prisoners, it was a tailoring course, reflecting Sim's theory that prison management is embedded in discourses of femininity and masculinity.

The prison management appears to rarely receive and apply international recommendations to consider women as more than mothers. Transgender and homosexual prisoners can easily find themselves in the situation of not being able to do activities that other male inmates do, or if they can, they attend them separately from the rest of the population.

### 7.1.6 Relationships are unofficially tolerated if they remain invisible

My findings confirm that sexual encounters happen in prison, in spite of legal prohibitions characterising both English and Italian legislation. However, I found that participants did not describe relationships only in sexual terms. Some managed to engage into more stable arrangements, while others referred of couples who met and got married inside prison, or continued their relationship outside after having met during their sentence.

These accounts are strikingly at odds with the way prison law and management regulate intimate contacts. Although the right to maintain relationships is a core component of the principle of rehabilitation under international human rights law, this is declined in terms of contacts with family, partners and friends outside, while the internal dynamics of prison space are not sketched out.

Statutory instruments do not explicitly prohibit sexual activity, although same-sex contacts are sanctioned to different degrees. It is impossible to determine precisely what kind of acts are condemned, as this varies from prison to prison and depending on staff's own prejudice.

A "don't ask don't tell" approach to sexuality is quite widespread: prisoners can develop relationships until manifestations of affection remain private, usually within the space of the cell. The harsher treatment was reserved to transgender women hosted in the special wing at ITA-3, where no contacts were allowed in any circumstances. Still, even this group found ways to communicate with other prisoners.

In the most punishing environment, my participants found the possibility to re-construct their sexuality within a relational dimension, and to find spaces of resistance to the heteronormative paradigm. Dynamics of unexpected kinship are not facilitated by unclear regulations, nor by the managerial approach to sexuality and contacts among prisoners, which does not consider the human rights implications of choices favouring indiscriminate surveillance over a humane approach.

I found that participants in a relationship tended to be very aware of privacy considerations, stressing that they had to respect others who might be uncomfortable in assisting at exchanges of affection.

Thus, the cell became for them a central space. However, the blanket prohibition of sexual contacts, accompanied by the uncertainty of what the term "sexual" really entails, allows prison staff to apply indiscriminate sanctions in case prisoners are "caught" in acts considered against decency, were they happening inside or outside the cell.

Long-term prisoners recalled how things were more difficult when homosexuality used to be criminalised, yet the fact that similar dynamics are reiterated, even if more leniently, constitutes evidence of the cyclical nature of discrimination grounded on homophobia and transphobia.

These policies do not protect prisoners from (sexual) violence or abuse. Data show that a culture of denial supported by a blanket ban on sex does not erase these behaviours, contrariwise it prevents them from emerging in the light.

Political choices such as banning conjugal visits or limiting contacts during social visits excessively are based on security reasons but actually increase the pains of imprisonment for LGBTQ prisoners and do not contribute to creating a safer environment.

#### 7.1.7 Heteronormative and gendered prison norms reproduce patterns of toxic masculinity within LGBTQ minority groups

Participants in the study tended to create hierarchies among different “types” of homosexual or transgender people, and between different ways people should experience their relationships. These categorisations were often created by tracing binary opposites (e.g. “true” versus “fake” homosexual people). The necessity to classify by differentiation was originated by two main factors. On one side, LGBTQ prisoners who declared their SOGI before imprisonment expressed the need to distinguish themselves from people who started engaging into same-sex sexual conducts inside prison, as they wanted to make clear – particularly to prison staff – that they could “be” LGBTQ without incurring a disciplinary sanction, thus “conforming” to the carceral state. By implication, “true” homosexual or “true” transgender people are not flashy, outgoing, or engage in excessively sexualised behaviour. Particularly in women’s prisons, inmates often sought to re-create heteronormative family dynamics: for example, the more feminine partner cooked while the one acting as “male” went to work. In these arrangements, sexuality was not be overt and should not be the main factor driving the relationship.

On the other hand, creating a hierarchy allows prisoners who are not visibly homosexual or transgender to maintain a position of power as an act of survival to the carceral state. No matter how many LGBTQ-related activities or inclusivity programmes the prison management introduced, participants’ lives were more bearable if they appeared “normal” and asexual, in line with the heteronormative model. Therefore, men who have sex with men, or women who have sex with women were deemed lesser than authentic homosexual people. It is not foreseen that a single-sex environment can give rise to previously unexplored desires. If it happens, it must be “for comfort,” for “boredom,” for prisoners “miss having sex,” or due to what the literature defines as “situational homosexuality.” Such a phenomenon may indeed happen, although this framing recalls State power attempts to “fix” sexuality and gender, instead of considering them as expressions of self that are continually performed.

Introducing private visitation programmes, as recommended by panels of experts operating in both countries, would be an initial step towards the acknowledgment of the importance of sexuality as essential human right. Nevertheless, this research supports this argument that the law, internationally and domestically, is in need of “queering,” for the notion of what is “acceptable” in terms of identity, gender and sexuality is too limiting and exclusionary.

## 7.2 Limitations of this research

This research empirically investigated the effects of heteronormative and gendered legal parameters in the lives of LGBTQ prisoners, but the limitations of this study must be acknowledged.

First, the necessity of negotiating with National Prison Services Committees, Prison Governors and Members of Staff of each visited prison narrowed my original sampling to participants who already declared their sexual orientation and gender identity at the time of the interview. I could only recruit participants located in certain wings of the prison establishment, rather than selecting participants across the whole prison complex.

In addition, I visited five prisons across two countries, which do not represent the experiences of LGBTQ people in every prison of England or Italy. Each penal estate presented unique dynamics that I sought to underline in my analysis.

I cannot claim data generalisation outside of sampled interviewees, nor was it the purpose of this study. As underlined by Buist, Lenning and Ball, “a vivid and detailed picture” of queer people’s experiences in the CJS is necessary to “penetrate the field of criminology” more deeply.<sup>1224</sup>

The qualitative methodology adopted to conduct the socio-legal analysis aimed to create a site of constructive knowledge that represented the positionality of the participants who volunteered for this research, as well as the experiences arising from our mutual exchange within a defined space and time. Norms regulating the prison complex produced restrictions to the interviews’ narrative flow, and to my liberty to delve into the discussed topics, for instance when interviews were interrupted by prison staff.

Nevertheless, circumstances such as the creation of a special wing to place together transgender women and homosexual people at ITA-3, or the intermittent tolerance towards same-sex sexual activity between prisoners were used to demonstrate the presence of prison structural queerphobia, and ultimately the State power’s lack of deep acceptance and understanding of these phenomena, in spite of sporadic institutional openings, such as the introduction of LGBTQ representatives or the inmates’ celebration of Pride.

Secondly, the nature of this project is explorative in light of the limited number of studies on sexual orientation and gender identity conducted in the European prison context. This led it to cover a wide range of issues affecting LGBTQ minorities, which I have sought to identify. The research demonstrates that similar normative assumptions affect the legal construction of the homosexual, bisexual and transgender subject, thus making it important to address both the treatment of homosexual, lesbian and bisexual prisoners, and that of transgender and non-binary inmates. If at times the lives of any of these groups have not been captured exhaustively, the specific research questions that this study intended to answer guided my data selection.

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<sup>1224</sup> Buist, Lenning and Ball, n.818.



### 7.3 Future explorations

I believe that the queer approach of this study contributes – through adopting queer questions about the legal representation of LGBTQ experiences – to underline the importance of connections between disciplines to critically challenge strategies of power and hierarchy.

Future developments pertaining to this research will seek to continue filling the gap between queer studies, criminological inquiry, and human rights law. In particular, this study showed the importance of a qualitative investigation of the lives of sexual and gender minorities inside prison, groups who have been frequently overlooked by public institutions and researchers.

I will submit two reports from my thesis to communicate my findings to the National Prison Service of each selected jurisdiction, including recommendations that I hope will provide useful guidance for future reforms.

I intend to draw from the ethical and methodological dilemmas that characterised my research to give my contribution to the existing literature on the relationship between the researcher and State power. The struggle to adapt a queer approach to bureaucratic procedures designed with the biologically defined, heteronormative subject in mind deserves further examination to suggest strategies to better capture relevant experiences of queer individuals in the CJS.

I am interested in elaborating on a wide range of data I collected with my interviews but I did not address in this study, particularly participants' personal experiences with the CJS, as well as their concerns about life post-release. I aim to scrutinise the ways State power and social surveillance over sexualities and identities risk compromising the enhancement of the right to a fair trial and of rehabilitation.

Finally, I believe that my findings demonstrate the importance of recognising the various ways people relate to each other, and the importance of supporting these channels of communication when they are fertile grounds for positive relationships, were they in terms of visits, private meetings, correspondence or other forms of communication. This research has provided the foundations to reconsider the way the law define the public/private divide in relation to queer individuals, and I will continue to contribute to the analysis of these socio-legal phenomena.





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